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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

–v.–

VISA U.S.A. INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 19, 1995

QUESTIONS PRESENTED FOR REVIEW

This case involves an antitrust challenge to a powerful joint venture's restraint of trade that has prevented increased competition while achieving no efficiencies. The opinion below, which nullified a jury verdict and validated the restraint as a matter of law, squarely presents two questions that have each produced three-way conflicts among the circuits in joint venture rule of reason cases:

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be:

   a. reasonably related to the venture's business interests, irrespective of efficiencies (10th Circuit);

   b. reasonably necessary to enhance the venture's efficiencies (D.C. Circuit and federal antitrust enforcement guidelines); or

   c. the least restrictive alternative to enhance the venture's efficiencies (1st, 2d and 9th Circuits)?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture:

   a. an important factor but not a threshold requirement (2d and 3d Circuits);

   b. a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors (D.C., 4th, 5th and 11th Circuits, and federal antitrust enforcement guidelines); or

   c. an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market (7th and 10th Circuits)?

PARTIES TO THE PROCEEDING

Petitioner MountainWest Financial Corporation, formerly known as SCFC ILC Inc. d/b/a MountainWest Financial, was plaintiff-appellee in Civil Action No. 91-C-47B below. Dean Witter, Discover & Co., formerly known as Dean Witter Financial Services Group, Inc., is the parent corporation of MountainWest Financial Corporation. (At the time this action was filed, Dean Witter Financial Services Group, Inc. was a wholly owned subsidiary of Sears, Roebuck and Co.; this is no longer the case. Thus, at trial and in the decisions below, Petitioner was sometimes referred to as "Sears.") For ease of reference, Petitioner will herein be denominated, where appropriate, as Dean Witter.

Respondent Visa U.S.A. Inc., a nationwide joint venture of banks and other financial institutions, was defendant-appellant below.

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VISA U.S.A. INC.,

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For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Tenth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 36 F.3d 958 (10th Cir. 1994) and is reprinted in the Appendix ("App.") to this petition at 1a-26a. On December 5, 1994, the Tenth Circuit denied Petitioner's petition for rehearing and suggestion of rehearing en banc. App. 128a. The Tenth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Utah, which upheld a final verdict rendered by a jury in favor of Petitioner on claims brought under Section 1 of

the Sherman Act. The District Court's opinion is reported at 819 F. Supp. 956 (D. Utah 1993) and is reprinted at App. 27a-106a. The District Court's pre-trial opinion denying Visa's motion for summary judgment is reported at 801 F. Supp. 517 (D. Utah 1992) and is reprinted at App. 107a-127a.

STATEMENT OF JURISDICTION OF THE COURT

The Court of Appeals for the Tenth Circuit denied rehearing on December 5, 1994. App. 128a. This Court subsequently granted petitioner's motion for an extension of time to file this petition until April 20, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

Overview

This is a "landmark"[1] antitrust case, "widely watched even beyond the banking industry" because of the "significant legal issues it raised."[2] In the decision below the Tenth Circuit validated, as a matter of law, the collective action of the members of the Visa joint venture in enacting a Bylaw that excludes from membership any firms that issue charge cards "deemed competitive" with VISA cards. Visa's Bylaw selectively "deemed competitive" the Discover and

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[1] *Visa Case is Headed for Supreme Court*, Banking Pol'y Rep., Oct. 17, 1994 at 15.

[2] Hansell, *Visa Wins Key Round in Antitrust Suit by Dean Witter*, N.Y. Times, Sept. 24, 1994 at 35.

American Express cards, but not other competing cards issued by Visa's members. Visa invoked the Bylaw to deny membership to Dean Witter, which issues Discover cards.

Following a three-week trial in late 1992, a jury in Salt Lake City, Utah returned a unanimous verdict against Visa under the rule of reason, finding that Visa's exclusion of Dean Witter significantly harms competition in the relevant market.[3] The District Court denied Visa's post-trial motion for judgment as a matter of law or for a new trial. Thereafter the Tenth Circuit reversed, holding that Visa's action was valid as a matter of law. The Tenth Circuit held that Visa, whose members collectively account for more than 70% of the relevant market, lacked market power and that Visa's Bylaw facilitated its business operations by preventing "free riding" by firms that issue their own competing proprietary cards.

The Tenth Circuit's reversal of the District Court's judgment was entirely on legal grounds.

Statement of Facts

The following key facts were introduced at trial. Based on a careful review of the record, the District Court held that the evidence was "reasonable, credible and capable of supporting the verdict reached by the jury." App. 70a.

Petitioner MountainWest Financial Corporation is a federally insured bank in Sandy, Utah owned by Dean Witter, Discover & Co. Respondent Visa U.S.A. Inc. is an industry-wide joint venture, consisting of about 6,000 banks and other financial institutions that issue VISA cards in competition with each other to consumers. R. at

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[3] At trial, the relevant market was defined as consisting of all charge cards that can be used for general purposes at a wide variety of retail establishments, whether or not the cards offer a revolving credit feature. App. 30a n.2. The two leading general purpose cards are VISA and MasterCard cards, which are issued by members of the Visa and MasterCard joint ventures, and are sometimes referred to as "association" cards. In addition, this market includes several "proprietary" cards, meaning cards issued by a single firm. Those proprietary cards are Diners Club and Carte Blanche cards, issued by Citicorp; Discover cards, issued by Dean Witter; and several different American Express cards, issued by American Express.

662-63.[4] The Visa venture itself does not issue VISA cards, but instead provides processing services and establishes rules for its members.

Visa is what is known as a "network" joint venture, meaning that it benefits from network efficiencies and economies of scale that grow as its membership grows. As the use of VISA cards increases, the Visa system becomes more valuable to participating merchants that accept VISA cards. R. at 667-68, 838. Concomitantly, as the number of participating merchants grows, the Visa system's value to its cardholders increases.[5] *Id.*

Apart from the exclusionary Bylaw at issue in this case, Visa membership is open to "[a]ny financial institution which is eligible for federal deposit insurance." App. 4a. Visa has admitted over 1,000 financial institutions into membership since 1988 and continues to admit hundreds of new members annually. R. at M629.

The restraint at issue in this case is an exclusivity requirement set forth in Visa Bylaw 2.06, adopted in 1989: "[I]f permitted by applicable law, [Visa] shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards *deemed competitive by the Board of Directors*." App. 5a (emphasis added). Visa interprets this provision to apply not only to firms that apply for membership but also to any existing Visa member that might issue its own proprietary

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[4] Record citations to "R. at __" are to the Appendix to Opening Brief of Appellant Visa U.S.A. filed with the Tenth Circuit. Citations to "R. at M__" are to the Supplemental Appendix of Appellee MountainWest filed with the same court, and citations to "R. at MS__" are to that supplemental appendix's Addendum.

[5] The telephone system illustrates how network efficiencies are achieved: the value of a telephone to an individual consumer increases as more people use telephones. In addition to Visa and MasterCard, other joint ventures that generate network efficiencies include automatic teller machine networks and real estate multiple listings services. *See* J. Tirole, *The Theory of Industrial Organization* 404-09 (1990); Katz & Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424 (1985).

card "deemed competitive" by the Visa Board. *Id.* 58a. Visa ultimately codified that interpretation in another Bylaw, 2.10(e), which provides that existing members may not issue proprietary cards in competition with VISA cards. R. at M645-47.

In 1982, seven years before Visa adopted Bylaw 2.06, Dean Witter's then-parent company, Sears, Roebuck and Co., formulated a business strategy to become an aggressive nationwide competitor in the general purpose card market. Sears already was a small issuer of VISA cards through the Sears Savings Bank in California, but Sears determined that it wanted to issue cards nationally and on a much larger scale. R. at 313-15. Sears' model in formulating that business strategy was Citicorp, which at the time was issuing multiple cards nationally—including VISA and MasterCard cards, as well as three proprietary cards: Diners Club, Carte Blanche and Choice. R. at M713-15. Sears concluded that it could compete most efficiently and effectively by pursuing a similar national multi-card strategy in order to span diverse consumer segments. R. at 316-17.

In 1986, Sears (through its Dean Witter subsidiary) introduced the proprietary Discover card, which was positioned as a low-priced competitor in the market. Discover card charged no annual fee, offered an innovative cash-back feature that repaid consumers based on their annual charge volumes, and set interest rates comparable to those offered by other large issuers. R. at 322-23. When Dean Witter introduced the Discover card, it had no reason to believe that it could not pursue the other half of its multi-card strategy—issuing an association card on a national basis—whenever it was ready to do so. R. at 319-21. Visa and MasterCard remained open to all qualified financial institutions, including those that issued proprietary cards. Citicorp, the largest member of Visa and MasterCard, was continuing to pursue a multi-card strategy encompassing two association cards and three proprietary cards. R. at M713, M749-52. Dean Witter's affiliate, Sears Savings Bank, continued as a Visa member to issue a small number of VISA cards. R. at 320.

As soon as Discover card entered the market, Visa "made numerous attempts to limit [its] success." App. 31a. Visa urged its members to make the introduction of the Discover card "more costly and unsuccessful" by, among other things, encouraging them to deny Discover access to transaction processing terminals at merchant

locations. R. at 330-31, 626-27, M279. At one point, Visa adopted a rule barring participating merchants from processing VISA card transactions over terminals developed by Discover. App. 31a. As Visa's vice president of marketing portrayed Visa's strategy:

> [B]y working together, and by being pro-active rather than reactive, I think we can thwart the efforts not only of Sears but of other outside competitors. . . . If we are successful in responding to Sears, then other non-bank competitors who are likely sitting on the sidelines will likely think again when they try to follow Sears' lead. If we are not successful, then there are going to be many more Discovers that we are going to be hearing about in coming years.

R. at M630. Notwithstanding Visa's campaign, the Discover card survived and became a profitable and growing business.

After it became clear that Discover card would remain in the market, Visa tried to convince Dean Witter to eliminate Discover as a competing proprietary card and instead to convert Discover into a VISA card, such as a "Discover VISA" card. R. at M220-49, M684-85. Thus, Visa wanted Dean Witter to become a member, but only on terms that eliminated Discover as a competing proprietary card. R. at 345-47. Dean Witter had no interest in membership on those terms. R. at 347-48.

Dean Witter's experience with the Discover card confirmed Sears' earlier judgment that it was essential to an effective multi-card strategy to be able to issue both proprietary *and* association cards. Research consistently showed that consumers sharply differentiate between Discover and the association cards. While the proprietary Discover card offered the advantage of being completely within Dean Witter's control, it lacked the universal acceptance (by merchants and consumers) that VISA and MasterCard cards enjoy because they are offered by most financial institutions. R. at 329, 687-88, M730-31. As a result, virtually all consumers who carry the Discover card also carry either a VISA or MasterCard card. (Conversely, many consumers who carry an association card do not also carry a Discover card.) R. at M608-26. In order to offer a card to replace the existing VISA and MasterCard cards in consumers' wallets, Dean Witter needed to be able to offer association cards as well. This multi-card strategy, already being employed by Citicorp, would allow Dean

Witter to maximize its scale economies and to compete more directly and effectively against existing issuers of VISA and MasterCard cards. R. at 687-89, 749-54, 1549-68, M281-339, M703-04, M712.

In late 1988, Dean Witter applied for Visa membership through Greenwood Trust Company, a bank owned by Dean Witter. R. at 334-35. Although Greenwood Trust met all existing requirements for membership in Visa, its application was rejected by Visa's Board of Directors.[6] R. at 338-39. At the same Board meeting, held on June 5-6, 1989 in Cannes, France, Visa's Board voted unanimously to adopt the selective exclusivity requirement of Bylaw 2.06. R. at 1583-84. Visa adopted the Bylaw because its members feared that admission of Dean Witter, which had aggressively priced and marketed its Discover card and which was regarded as a maverick in the industry, would exert downward pressure on their prices and profit margins. R. at 340-41, M792-94. As Citicorp's Visa Board representative explained his vote against Dean Witter: "Discover card was a very effective price competitor, and had been very successful and [I] did not want to encourage that kind of price competition within Visa." R. at 340-41.

In addition, Visa intended that its exclusion of Dean Witter serve as a warning to deter other firms from introducing new competing proprietary cards. At the same Board meeting in which Bylaw 2.06 was adopted, the Visa Board instructed management to compile a list of other non-bank firms capable of introducing a new competing proprietary card. R. at M490-514, M689-94. The resulting list named more than 100 non-bank firms (including General Motors, Ford, Chrysler, Shell Oil, Amoco Oil, and AT&T) that were deemed to have the *potential* to issue competing proprietary cards. The Visa Board instructed that all of those firms, many of which were then Visa members, be monitored and either expelled or excluded if they became *actual* issuers of cards "deemed competitive" by Visa's Board. R. at M689-94, M742-43.

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[6] The minutes of the Visa Board of Directors meeting recorded that Greenwood Trust's membership was denied because "Greenwood Trust Company is the issuer of Discover cards and has no intention of converting that program; rather they intend to issue both Discover cards and VISA cards." R. at 1583-84.

As a result of Bylaw 2.06, no firm—other than Citicorp—is free to pursue the efficient and competitively effective multi-card strategy that Dean Witter sought to deploy. Visa members that otherwise would have an interest in issuing proprietary cards on the proprietary networks established by Dean Witter and American Express cannot pursue that strategy while remaining in the Visa venture. Nor, for the same reason, can Visa members create their own proprietary networks. Further, all other firms that are *potential* entrants in the charge card market are forced to choose between issuing association cards or a proprietary card. Under these circumstances, no firm has pursued a new proprietary card strategy since Bylaw 2.06 was adopted. R. at 1055-57, M693-94. Indeed, Dean Witter's chief executive officer testified at trial that Dean Witter would not have introduced its proprietary Discover card had it known the exclusionary penalty that Visa would impose on it as a result. App. 75a.

In 1990, Dean Witter purchased the assets of MountainWest's predecessor, a savings and loan in Salt Lake City, Utah that was already a Visa member and was issuing a small number of VISA cards. R. at 164-78, M664-65. Dean Witter sought to use MountainWest to move forward on its multi-card strategy by issuing an association card on a national basis. Dean Witter determined that MountainWest would offer a new, aggressively promoted and low-priced "Prime Option" VISA card to consumers throughout the United States.[7] R. at 349, M734-35. Visa's large issuers recognized that a large-scale, low-priced entry like Prime Option would have a significant impact in the market. R. at M792-94, MS10, MS53. Indeed, one of Visa's experts testified that for each one percentage

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[7] Prime Option VISA contemplated a 25-day grace period without charge, carried a reduced interest rate on current purchases and set an opening credit line of $3500. R. at M666-69. The interest rate on Prime Option VISA was to be 9.9% on each purchase for the first 60 days that the purchase was outstanding and 9.9% plus the prime interest rate (then 6%) thereafter. R. at M667-69. There was to be no annual fee charged to any cardholder. R. at M667. At the time of trial, the average interest rate charged on VISA and MasterCard cards was about 18%, and the average annual fee was about $17. R. at 1463-64.

point drop in average charge card interest rates, consumers would save nearly two billion dollars annually. R. at M768-71.

Upon learning of Dean Witter's involvement in MountainWest, Visa refused to permit the issuance of Prime Option VISA, citing its Bylaw 2.06. App. 33a. MountainWest then filed suit, contending that Visa's Bylaw constitutes a concerted refusal to deal and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. *Id.*

District Court Proceedings

After a three-week trial, the jury returned a unanimous verdict against Visa. Pursuant to special interrogatories, the jury found that Visa violated Section 1 of the Sherman Act by adopting Bylaw 2.06 and applying it against Dean Witter. App. 37a-38a. The jury specifically found that: (i) Bylaw 2.06 "has a substantially harmful effect on competition in the relevant market;" (ii) this harmful effect "substantially outweighs any beneficial effect on competition in the relevant market;" and (iii) Dean Witter "was injured by Visa's Bylaw 2.06." *Id.*

After trial, Visa moved for judgment as a matter of law and alternatively for a new trial. Carefully evaluating the record evidence, the District Court (Dee Benson, J.) declined to set the verdict aside. The court found substantial evidence that Visa members, when acting collectively through the joint venture, have market power in the relevant market. App. 45a. The court further found that Bylaw 2.06 constitutes an exercise of that market power in order to exclude selected competitors with the effect of maintaining higher prices. *Id.* 72a-75a. Noting that Visa members collectively have a market share exceeding 70%[8] and that the Bylaw "shields current Visa members from vigorous competition," the court rejected Visa's argument that no reasonable jury, as a matter of law, could have found that Bylaw 2.06 substantially harmed competition in the relevant market. *Id.* 73a-76a. Instead, the court held that,

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[8] The collective charge volume of the Visa system alone constitutes 45.6% of the relevant market. Additionally, the District Court found that "[t]he evidence also showed that Visa members, through their membership in the MasterCard association, control an additional 24.6% of the market—for a total of [over 70%]." App. 45a.

based on the evidence, it was reasonable for the jury to conclude that Bylaw 2.06 harmed competition both by "preventing [Dean Witter's] low-cost Prime Option VISA card from entering the market, and by creating a disincentive for the creation of new proprietary cards." *Id.* 75a.

Finally, the District Court rejected Visa's arguments that Bylaw 2.06 was procompetitive as a matter of law. As to Visa's claim that Bylaw 2.06 was essential to protect the "incentives for the creation and maintenance of joint venture property"—*i.e.*, to prevent so-called "free-riding"—the court found that the jury either had "simply discredited the evidence presented" by Visa on this issue, or had found "the benefits to competition were outweighed by the harmful effects" of the Bylaw. App. 77a. Either way, "it was the jury's prerogative to weigh the evidence." *Id.*

The Tenth Circuit's Decision

The Court of Appeals (Moore, J.; Seth, Sr. Cir. J.; Daugherty, Sr. D. J.) set aside the District Court's judgment and nullified the jury verdict against Visa entirely on legal grounds. The court held that market power was a threshold "screen" for analyzing whether Visa's exclusionary Bylaw should be subject to full factual scrutiny under the rule of reason, App. 13a, and that Visa's 6,000 issuer members, although representing over 70% of the relevant market, lacked market power when acting collectively because the Bylaw did not entirely exclude Dean Witter from the relevant market. *Id.* 17a-19a. In addition, the court accepted, again as a matter of law, Visa's asserted justification that its exclusionary Bylaw was "reasonably related to Visa USA's operation" because it prevented "free riding" on Visa by members that would compete against the Visa venture with their own proprietary cards. *Id.* 21a.

Dean Witter's timely petition for rehearing and suggestion for rehearing en banc were denied without comment on December 5, 1994. App. 128a.

REASONS FOR GRANTING THE WRIT

It has been nearly a decade since the Court decided the last of four cases involving challenges to restraints of trade imposed collectively by joint ventures.[9] In those cases, the Court clarified that arrangements among competitors acting through a joint business entity to create new products or to achieve integrative efficiencies are generally to be evaluated under the rule of reason. "Unfortunately, however, the Court never explained in these cases exactly how the rule of reason analysis should be conducted." Piraino, *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 892 (1994). As a result, the lower courts have struggled over the past decade to apply the rule of reason in joint venture cases, and their decisions reflect pervasive division and confusion. The Tenth Circuit's opinion, which upholds as a matter of law Visa's requirement that no Visa member or applicant may issue a proprietary card "deemed competitive" with VISA cards, squarely presents two central features of the rule of reason analysis that have troubled and divided the lower courts.

First, the Tenth Circuit's ruling deepens a three-way split among the circuits regarding the standard for determining whether joint venture restraints are ancillary.[10] The circuits have formulated three different and incompatible rules that range from (1) the Tenth Circuit's permissive formulation that the restraint need only be reasonably related to the joint venture's business operations; to (2) the more exacting rule that the restraint must be reasonably

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[9] *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[10] Under this Court's precedents, restraints of trade that are not properly considered ancillary may be condemned without extensive further inquiry, and in some cases may even warrant *per se* condemnation. *See, e.g., NCAA*, 468 U.S. at 106-10; *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982). By contrast, restraints that are judged to be ancillary receive more liberal treatment under the rule of reason. *See, e.g., BMI*, 441 U.S. at 20-24.

necessary to enhance the joint venture's efficiencies; to (3) the strictest rule that the restraint must be the least restrictive alternative to enhance those efficiencies. The Tenth Circuit's permissive formulation caused it to ignore that Visa's Bylaw creates no efficiencies and instead harms consumers and competition. This case thus illustrates the importance of requiring that a joint venture restraint contribute to the venture's efficiencies in order to be deemed ancillary.[11]

Second, the Tenth Circuit's opinion compounds yet another three-way split among the circuits, this time regarding the proper threshold showing of market power, if any, that must be made to challenge a joint venture restraint under the rule of reason. The Tenth Circuit held that the collective market share of Visa and its members is irrelevant and instead required Dean Witter to make a threshold showing that it was being excluded entirely from the relevant market. In the absence of such a showing, the court held, Dean Witter could not—as a matter of law—maintain a challenge to Visa's exclusionary conduct. This holding conflicts with lower court decisions that have held that market power is only one factor in the rule of reason analysis, and thus that no market power threshold, or "screen," is appropriate. It further conflicts with other decisions that have required a threshold showing that the venture members have a substantial collective market share and the ability to disadvantage competitors, but that have not imposed a heightened requirement that exclusion from the venture effectively entails exclusion from the relevant market.

The Tenth Circuit's market power analysis likewise conflicts with this Court's consistent holdings that disadvantaged firms may challenge exclusionary conduct even though they remain viable, albeit less effective, competitors in the relevant market. By improperly focusing on the ability of a single competitor to remain in the market, rather than on the adverse impact on competition

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[11] On this and other issues, the Tenth Circuit purports to follow but actually contradicts key aspects of the D.C. Circuit's *Rothery* opinion. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, R. Ginsburg, Wald concurring), *cert. denied*, 479 U.S. 1033 (1987).

caused by an exclusionary restraint, the Tenth Circuit disregarded and undermined this Court's frequent admonition that the antitrust laws protect competition, not competitors.

Still further, both the Tenth Circuit's ancillarity and market power analyses conflict with recent antitrust enforcement guidelines issued by the Department of Justice and Federal Trade Commission that focus, in large measure, on the acceptable limits of joint venture conduct.

This conflict and confusion is particularly unfortunate because of the growing importance of joint ventures in the American economy. As Peter Drucker recently noted, "the greatest change in corporate structure—and in the way business is being conducted—may be the accelerating growth of relationships based not on ownership but on partnership: joint ventures; minority investments cementing a joint-marketing agreement or an agreement to joint research; semi formal alliances of all sorts." Drucker, *The Network Society*, Wall St. J., March 29, 1995 at A12. The kind of joint venture at issue here—one that engages in "network" activities—has become especially important in light of the rapid changes in technology that are occurring throughout the economy. These changes have the potential to facilitate business transactions in a wide variety of fields, including information services, communications, financial services and health care. But that potential can be realized only if the legal standards governing joint ventures are clear and reflect a proper understanding of the ways in which such ventures serve the interests of consumers.

In sum, there is a pressing need for authoritative resolution by the Court of the two issues presented by this case.

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH OTHER CIRCUITS BY VALIDATING AS ANCILLARY A JOINT VENTURE'S COUNTER-EFFICIENT AND HENCE NAKED RESTRAINT OF TRADE.

In its quartet of joint venture cases decided since 1979, the Court never encountered a suitable opportunity to provide adequate antitrust guidance regarding how, under the rule of reason, a joint venture's restraint of trade must relate to the venture's efficiencies. While the

Court noted in *BMI* and *Northwest Wholesale Stationers* that a restraint that may "increase economic efficiency" should be subjected to rule of reason—and not *per se*—analysis, *see* 441 U.S. at 19-20; 472 U.S. at 294-95, the Court's remands in those two cases prevented actual application of that analysis. Similarly, the restraint struck down in *NCAA* required no more than the comment that it was "not even arguably tailored to serve" its asserted purpose. *See* 468 U.S. at 119. Finally, in *Indiana Federation of Dentists*, the Court faced a restraint that not even its proponents claimed possessed "competitive virtue." *See* 476 U.S. at 459-60. Thus, while these decisions have suggested to many lower courts that they should pay some attention to the connection between a restraint and the venture's efficiencies, the decisions have not provided any real guidance about the legal standard that should be applied. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 472 (6th Cir.) (application of rule of reason to horizontal restraints is "murky and unclear"), *cert. denied*, 113 S.Ct. 461 (1992). As a result, there are deep divisions among the lower courts that the Tenth Circuit's ruling both typifies and exacerbates.

A. The Lower Courts Are Mired in a Three-Way Split on the Proper Test for Distinguishing Between "Ancillary" and "Naked" Restraints of Trade.

Nearly a century ago, Judge (later Chief Justice) Taft's seminal opinion in *Addyston Pipe* drew a sharp distinction between ancillary and naked restraints of trade under the Sherman Act. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). According to Taft, restraints are ancillary when they are incidental to and enhance the procompetitive purposes of a legitimate joint enterprise. 85 F. at 280-83. By contrast, restraints are naked when they do nothing more than eliminate competition.

In 1986, the D.C. Circuit's *Rothery* decision recast Judge Taft's classic formulation into modern economic terms by focusing on a restraint's contribution to a venture's efficiency as the key to contemporary antitrust analysis. As the *Rothery* court explained:

> To be ancillary, . . . an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and

> collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.

792 F.2d at 224.

In upholding Visa's exclusionary Bylaw in this case, however, the Tenth Circuit applied a more permissive test for separating "ancillary" and "naked" restraints. Rather than examining whether the challenged restraint contributes "to the efficiency of a contract integration," *Rothery*, 792 F.2d at 229, the court asked only whether "the alleged restraint is *reasonably related to Visa USA's operation* and no broader than necessary to *effectuate the association's business*." App. 21a (emphases added). Signally, this formulation is satisfied even though a restraint creates no efficiencies but merely increases member profits by reducing competition.

The court purported to quote and follow *Rothery's* formulation that the Bylaw must be "'subordinate and collateral . . . [making] the main transaction more effective in accomplishing its purpose,' which is to provide credit card services to its members." App. 21a (*quoting Rothery*, 792 F.2d at 224). But the Tenth Circuit's cropped quote cut off the key qualification that *Rothery* had added immediately thereafter: "Of course, the restraint imposed *must be related to the efficiency sought to be achieved*. If it is so broad that part of the restraint suppresses competition *without creating efficiency*, the restraint is, to that extent, not ancillary." *Rothery*, 792 F.2d at 224 (emphases added).

Rothery's requirement that an ancillary restraint contribute to the venture's efficiency, not just to the business interests of the venture or its members, is critical. A joint venture's business interest lies in maximizing its members' profits, even by means that are inefficient or anticompetitive. The requirement that members use the joint venture to pursue profits only *through gains in efficiency* ensures that collateral restraints will be output-expanding and thus will benefit consumers. This is precisely the distinction recognized by the Seventh Circuit in *Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc.*, 814 F.2d 358 (7th Cir.

1987), which struck down a restraint that increased defendants' profits but served no efficiency-enhancing function. The Seventh Circuit explained that where producers merely seek to reduce price competition among themselves, they "destroy the power" of a "free riding" justification because there is no "alignment of interests" between the producers and consumers as the restraint has no "potential to create the efficient production that consumers value." *Id.* at 369-70.

In sharp contrast to the Seventh Circuit in *Premier Electrical*, the Tenth Circuit in this case failed to draw this crucial distinction between the pursuit of profits generally and the pursuit of profits through gains in efficiency. Instead, as explained more fully in Section I (B), the court accepted as a matter of law Visa's argument that its members should be able to deny a competitor the benefits of venture membership *even though* the Visa joint venture's efficiency would have been enhanced by the admission of Dean Witter as a new member, and *even though* Visa's reason for selectively excluding this competitor was "to discourage price competition." *See* App. 21a. By not requiring Visa to explain how its restraint of trade contributed to the efficiency of the Visa network, the Tenth Circuit improperly permitted the venture to protect its members' profits at the expense of consumers.[12]

The Tenth Circuit's permissive standard follows similar authorities that likewise failed to distinguish between the pursuit of profits and the pursuit of profits through gains in efficiency. As FTC Chairman Robert Pitofsky has noted, "courts and commentators" analyzing joint ventures "at times have overlooked . . . whether the restrictions inherent in the joint venture are reasonably related to achieving efficiencies." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1620 (1986). *See also id.* at 1614 ("Courts and commentators have rarely examined the

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[12] *See generally* Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (forthcoming Summer 1995) (explaining why profit motive of joint venture participants may lead them to exclude from membership an especially aggressive or efficient firm whose membership would contribute to the venture's efficiency but would enable the firm to compete more effectively against existing members).

level of integration, or the likely levels of efficiency, of particular joint ventures. Once the arrangement was 'characterized' as a joint venture and not a cartel—that is, it was found that some integration was present—it has been *assumed* that substantial efficiencies were involved.") (emphasis added). Notable circuit opinions that presaged the Tenth Circuit in making this fundamental error include *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co.-East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (territorial division between potential competitors upheld as "reasonable" means of furthering the "legitimate purpose" of protecting property from the effects of competition), *cert. denied*, 433 U.S. 908 (1977) and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (restriction upheld as not "'exceed[ing] the outer limits of restraint reasonably necessary to protect the defendant'" in its "business purpose") (citation omitted).

The Tenth Circuit's rule squarely conflicts with *Rothery* and with other decisions that focus on efficiency and consumer welfare. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d at 470-72 (upholding FTC ruling that agreement between competitors to limit hours of operation violated rule of reason based on FTC analysis that restraint lacked "a 'plausible' efficiency justification"); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output.").

The Tenth Circuit is likewise in direct conflict with the current antitrust enforcement guidelines of the Justice Department and the Federal Trade Commission, which require that joint venture exclusionary restraints be justified based on efficiencies. For example, the guidelines directed at the health care industry—which is replete with joint ventures and cooperative provider alliances—state that "collateral agreements" in diverse situations must be "reasonably necessary to achieve the efficiencies sought by the joint venture." U.S. Department of Justice & Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, 67 Antitrust & Trade Reg. Rep. at S-18 (Sept. 29, 1994 Supp.) ("*1994 Health Care Guidelines*"). The same efficiency prerequisites also pervade the recently issued intellectual

property guidelines. U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-11 (April 13, 1995 Supp.) ("*1995 Intellectual Property Guidelines*") (examining whether "restraint in a licensing arrangement" is "reasonably necessary to achieve procompetitive efficiencies"); *id.* at S-14 ("collective price or output restraints . . . may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants").[13] The Tenth Circuit undercuts the purpose of these guidelines by deepening the legal conflict and confusion surrounding joint venture ancillary restraints.

The Tenth Circuit's permissive rule of "ancillarity" conflicts further with an even stricter test applied by other courts, which validates restraints as ancillary *only* if no "less restrictive alternative" exists to achieve the purpose of "mak[ing] the joint activity more efficient." *Sullivan v. National Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1252 (1995). *See also Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1396 (9th Cir.) (same), *cert. denied*, 469 U.S. 990 (1984); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir.) (same), *cert. denied*, 459 U.S. 1074 (1982). Notably, these decisions have been criticized as too intrusive. *See, e.g., North Am. Soccer League*, 459 U.S. at 1079 (Rehnquist, J., dissenting from denial of certiorari) (noting disagreement among lower courts and questioning the "least restrictive alternative analysis"); *American Motor Inns*, 521 F.2d at 1249 ("'less restrictive alternative'" test puts "undue burden on the ordinary conduct of business" by requiring courts to "second-guess [ ] business judgments").

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[13] An efficiency-based formulation was also presented by the Solicitor General's *amicus curiae* brief for the United States in the *NCAA* case, which invalidated a naked restraint on output imposed by an educational membership association. The Solicitor General argued that "it is not enough that a restraint accompanies an otherwise legitimate cooperative activity," for the restraint must also be "reasonably necessary to achieve such efficiencies." Brief for the United States at 11 n.9, *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (No. 83-271).

B. The Tenth Circuit's Permissive Test Led It to Approve, as a Matter of Law, a Counter-Efficient Restraint of Trade.

This case compellingly illustrates the importance of requiring that ancillary restraints contribute to a joint venture's efficiency and not merely to the business interests of the venture or its members. By excluding a firm that would have expanded output both within and outside the venture and would have spurred increased price competition, Visa's Bylaw 2.06 serves the interest of Visa's members in maximizing their profits while reducing, not enhancing, the venture's efficiency. In this case, once analysis under the rule of reason established that Visa's Bylaw restrained competition without any efficiency justification, the Bylaw should have been struck down as a matter of law as a "naked" restraint of trade.[14]

Had the Tenth Circuit focused on the relationship between the challenged restraint and Visa's efficiency, it would have readily determined that Visa's Bylaw is counter-efficient and, thus, not ancillary. As explained above, Visa benefits from network efficiencies and economies of scale that grow as Visa's membership grows. In order to take advantage of these efficiencies, Visa—except for this exclusionary Bylaw—uniformly follows an open membership policy. While each new member may, especially in the short term, compete against and harm some individual existing *members*, each new addition enhances the efficiency of the Visa *venture*. Any abrupt and selective change in Visa's open membership policy—like its exclusionary Bylaw—is therefore immediately suspect from a competitive standpoint, because it is facially counter-efficient. *See, e.g.*, H. Hovenkamp, *Economics & Federal Antitrust Law* § 10.3, at 283-85 (1985); P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.1 (1994 Supp.); Carlton & Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*,

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[14] Dean Witter accordingly moved for judgment as a matter of law at the close of evidence on the basis that Bylaw 2.06 was counter-efficient and thus unlawful under the rule of reason. R. at M811-15. The District Court declined to so hold as a matter of law and submitted the case to the jury, which unanimously endorsed Dean Witter's claim as a matter of fact.

Working Paper No. 111, Center for the Study of the Economy and the State, The University of Chicago 15-18 (April 1995).

In Visa's case, these suspicions are underscored by the related Bylaw provision, 2.10(e), which threatens to expel any existing Visa member that issues a proprietary card "deemed competitive" by Visa. As a result of these twin restrictions, no firm—other than Citicorp—may issue both a VISA card and a proprietary card. The consequent reduction in output and curtailment of consumer choice, which sacrifice the venture's efficiencies in order to squelch competition from proprietary cards issued by Visa members, is a textbook "naked" restraint. *See, e.g., NCAA*, 468 U.S. at 106-10 (joint venture restraints that merely reduce output and narrow consumer choice are "naked").

Because the Tenth Circuit examined only whether Visa's restraint reasonably serves the business interest of the venture or its members, however, the court felt free to disregard the Bylaw's obviously counter-efficient nature. Instead, the court accepted at face value Visa's assertion that it is preventing "free riding" by a competitor in order to avoid the "added costs" that Dean Witter would impose "by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against." App. 23a. The court thereby ignored that, in order to enhance its efficiency as a network venture, Visa continues to admit every year hundreds of new members that "have done nothing to create" the venture's brand. Not surprisingly, the court did not identify any "added costs" that were unique to Dean Witter or were not covered by the fees that Visa customarily charges its members, old and new, most of which also issue competing MasterCard cards.[15] *Id.*

The speciousness of Visa's supposed concern about "free riding" is further highlighted by Visa's selectivity in targeting its exclusionary Bylaw. By its terms, Visa's rule applies only to those

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[15] *Cf. Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir.) ("What gives this the name *free*-riding is the lack of charge . . . . When payment is possible, free-riding is not a problem because the 'ride' is not free.") (emphasis in original), *cert. denied*, 113 S.Ct. 409 (1992).

firms that the Visa Board chooses to "deem competitive." Visa claims that Dean Witter has been so "deemed" because of its proprietary Discover card. Yet the Visa Board has not targeted Citicorp, which continues to be the largest issuer of VISA and MasterCard cards, even though Citicorp issues *two* competing proprietary cards, Diners Club and Carte Blanche. If there were a genuine "free riding" problem associated with VISA card issuers also issuing proprietary cards, then Citicorp—which itself was a "latecomer" that joined Visa years after the venture's formation (R. at M747)—would have been excluded or expelled from Visa years ago.

The Tenth Circuit also acknowledged, without explicitly accepting, Visa's argument that by preventing selected competitors from "free riding," Visa was actually promoting "intersystem competition" against itself. App. 20a. This argument should have been rejected as legally deficient, both as unrelated to any Visa efficiencies *and* as irrational on its face. Firms do not take actions for the purpose of strengthening their competitors. In this case, it is not credible (as the jury surely perceived in rejecting this defense) that the Visa Board, composed of astute financial executives, enacted the exclusionary Bylaw for the purpose of empowering other card systems to compete more effectively against Visa. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-89, 594 n.19 (1986) (rejecting "economically irrational" theories as a matter of law). Moreover, Visa gave the lie to this argument when it invited Dean Witter into the Visa venture so long as Dean Witter agreed to convert the Discover card to a VISA card (R. at M220-49, M684-85), which would have reduced intersystem competition. That was Visa's purpose in issuing the invitation.

The dangerous legacy left by the Tenth Circuit's ancillarity analysis, if unchecked by this Court, is manifest. One recent guide to business planning along the information superhighway relied exclusively on the Tenth Circuit's decision in this case to opine that "it is logical for joint venture partners to exclude nonparticipants from the benefits of the venture," and lauded the Tenth Circuit for allowing Visa to exclude a firm that would have "increase[d] costs to Visa members unfairly." Perritt, *Access to the National Information Infrastructure*, 30 Wake Forest L. Rev. 51, 81-83 (1995). But these

views are pernicious. As this case starkly illustrates, the pursuit of profits through the exclusion of a low-cost producer does not aid consumers and competition. The Court should grant the writ in order to hold that joint venture restraints are ancillary only if they benefit consumers by enhancing the venture's efficiency.

II. THE TENTH CIRCUIT DECISION CONFLICTS WITH OTHER CIRCUITS AS TO THE ROLE AND DEFINITION OF MARKET POWER IN EVALUATING A JOINT VENTURE'S RESTRAINT OF TRADE UNDER THE RULE OF REASON.

Although the Court considered several joint venture restraint cases in the mid-1980's that raised issues relating in some way to market power, the Court has not had a suitable opportunity to address an important and recurring issue that has divided and perplexed the lower courts: the proper role and definition of market power in evaluating joint venture restraints of trade under the rule of reason.[16]

As a result, the lower courts have struggled with whether and how market power should be used to distinguish joint venture restraint cases that require extensive factual scrutiny from those that can be resolved more quickly. Some courts have treated market power as an important factor under the rule of reason, but not as a dispositive threshold requirement. Other courts have said that market

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[16] In *NCAA*, the Court invalidated a joint venture's collective membership restriction, stating that although the association *had* market power, even "absence of proof of market power does not justify a naked restriction on price or output." 468 U.S. at 109. Shortly thereafter, the Court unanimously held in *Northwest Wholesale Stationers* that "some showing" that a joint entity either possessed collective market power or was "essential to effective competition" is a "threshold" element in determining whether to subject an entity's collective expulsion of a member to *per se* condemnation. *See* 472 U.S. at 295-97. One year later, the Court unanimously invalidated a collective restraint by a joint membership association and held that, even when a restraint is not "naked" enough to obviate a market power showing under *NCAA*, no "detailed market analysis" is required where there is actual proof of detrimental anticompetitive effects. *See Indiana Fed'n of Dentists*, 476 U.S. at 460.

power should be a threshold "screen" used to dispose of cases without lengthy analysis, and have looked to the collective market share of the venture and its members and their ability to disadvantage competitors in order to apply the screen. Still other courts have said that there should, indeed, be a market power screen but have applied an elevated standard, which treats collective market share as irrelevant and requires a showing that exclusion from the venture effectively excludes the plaintiff entirely from the relevant market.[17]

These three sets of cases are fundamentally at odds with one another and have provoked considerable confusion and controversy among the lower courts. According to the Eleventh Circuit, whether courts "must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law." *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). According to the Second Circuit's recent assessment, the "precise role that market power plays" under the rule of reason remains "a matter of some dispute." *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993). This case presents an opportunity for the Court to resolve these conflicting precedents because it squarely raises the question of what, if any, threshold showing of market power must be made to challenge a joint venture's restraint of trade under the rule of reason.

The Second Circuit's decision in *Capital Imaging* is one example of a case that treats defendants' market power as important, but not as a dispositive threshold requirement, under the rule of reason. *See* 996 F.2d at 537. There the court held that market power

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[17] These clashing antitrust formulations, rooted in different beliefs about the economic premises of the Sherman Act, are sometimes found in separate opinions in the very same case. *Compare Rothery*, 792 F.2d at 217 & n.3 (analysis "might begin and end" with defendants' small collective market share), *with id.* at 230-32 (Wald, J., concurring) (expressing concern about use of market power "as the exclusive filtering-out device for all potential violators that do not command a significant market share," and stating that "market power is an important consideration; I am not yet willing to say it is the only one," pending more definitive Supreme Court guidance).

is a "highly relevant factor" in joint venture restraint cases but is not "the *sine qua non* of antitrust liability." *Id.* at 546. The Third Circuit has likewise refused to treat market power as determinative, stating that under the rule of reason a defendant must "promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis.'" *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (citation omitted).

By contrast, the second group of joint venture restraint cases holds that market power *should* be used as a dispositive screen. This group, in applying its screen, focuses on the collective market share of the venture and its members and their ability to disadvantage competitors. *See, e.g., Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (en banc) (dismissing Section 1 claim for lack of market power where defendants possessed only 5.2% share of relevant market), *cert. denied*, 502 U.S. 1074 (1992); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991) ("threshold question of market power" focuses on collective market share and competitive significance of venture), *cert. denied*, 113 S.Ct. 295 (1992); *Rothery*, 792 F.2d at 220 (dismissing Section 1 claim for lack of market power where defendants possessed 6% market share); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-74 (5th Cir. 1980) (multilist organization crossed market power "threshold" where its members "constitute[d] a vast majority" of brokers in the market and membership conferred competitive advantage). Under these cases, if there is no market power, a venture's restraints either are immune from antitrust scrutiny or are at most subject to an "abbreviated inquiry."

The cases in this second category reason that restraints imposed by a venture with a small collective market share are generally not of antitrust concern because such restraints are unlikely to have an adverse impact on competition. *See, e.g., Oksanen*, 945 F.2d at 709 (absent "market power, any restraint on trade created by the defendants' [exclusionary] actions is unlikely to implicate section one"). By contrast, restraints imposed by a venture that possesses a large collective share and the ability to disadvantage competitors can cause competitive harm and thus warrant close rule of reason scrutiny. For example, a venture whose members possess a large collective market share often confers a "significant competitive

advantage" on its members such that those excluded from the venture are rendered less effective in the marketplace. *See, e.g., Realty Multi-List*, 629 F.2d at 1370-71 (firm may "be more aggressive and willing to accept a lower" price if it has access to the network); *Thompson*, 934 F.2d at 1580 (same). In addition, if a venture and its members possess a large collective share, the remaining competition outside the venture is limited and is unlikely to be significant enough to overcome the anticompetitive impact of the venture's restraints. *See, e.g., Rothery*, 792 F.2d at 217. Thus, these cases call for careful rule of reason scrutiny where a venture with a large collective market share imposes restraints that target particularly efficient or aggressive competitors for exclusion or that legislate the terms on which competition takes place among the venture's members. *See generally* Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, *supra* (discussing importance of collective power in joint venture exclusion cases).

There is yet a third distinct approach that applies an elevated threshold market power requirement in cases that involve exclusion from joint venture membership. These decisions treat the collective market share of the venture as irrelevant and instead focus on whether the plaintiff can show that exclusion from membership effectively excludes it entirely from the relevant market. *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (denial of certification by nationwide professional group did not meet threshold market power requirement where "plaintiffs already are sellers in the market [and] turning down their applications for certification does not remove their output from the market"). *See also Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280, 1287-89 (7th Cir. 1982) (dismissing rule of reason challenge as a matter of law, in part, because plaintiff's "continued economic viability [was not] threatened by the challenged membership decision"); *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1492, 1495-97 (7th Cir. 1983) (Posner, J.) (where party excluded from large joint venture remains in the market after exclusion, it cannot "ask the trier of fact to draw an inference" of effect on price or output), *modified on other grounds*, 726 F.2d 1150 (7th Cir. 1984) (en banc),

rev'd on other grounds, 470 U.S. 373 (1985).[18] *See also* Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act*, 1993 Utah L. Rev. 999, 1105 (proposing that plaintiffs be required to make an "essential facilities" showing in cases challenging exclusion from network joint ventures).

The Tenth Circuit here adopted this heightened standard and held that unless Dean Witter could prove that its exclusion from the Visa venture effectively entails exclusion from the relevant market, Visa's exclusionary restraint was valid as a matter of law. The court initially held that "proof of market power" was a "critical first step, or 'screen,' or 'filter,' which is often dispositive of the case." App. 13a. But in evaluating whether Visa possessed market power, the court treated as unimportant evidence showing that Visa's members collectively account for over 70% of the relevant market.[19] *Id.* 16a-18a. Instead, the court declared that the controlling "legal issue" under its screen was whether the Visa Bylaw resulted in Dean Witter's "exclusion from the market." *Id.* 18a. Because Dean Witter remained able to compete (albeit less effectively) with its proprietary Discover card, the court held that Dean Witter's Section 1 claim failed as a matter of law. *Id.* 18a-19a.

The Tenth Circuit stated its own legal error succinctly: "Surely, if [Dean Witter's] goal is to compete *more effectively* in that market,

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[18] By contrast, in dealing with joint venture restraints other than exclusion from membership, the Seventh Circuit has imposed a threshold market power requirement that focuses on the collective market share of the venture and its members and their ability to disadvantage competitors. *See, e.g., Wilk v. American Medical Ass'n*, 895 F.2d 352, 359-60 (7th Cir.) (defendant medical association crossed market power "threshold" where association's members "constituted majority of medical physicians"), *cert. denied*, 498 U.S. 982 (1990).

[19] To the extent the court considered market share statistics, it focused on the shares of Visa's numerous individual members. App. 17a-18a. By focusing on *individual* member shares, even though Visa's members *collectively* enacted the restraint, the Tenth Circuit is in sharp conflict with this Court's precedents. *See, e.g., Indiana Fed'n of Dentists*, 476 U.S. at 460; *Associated Press v. United States*, 326 U.S. 1, 11 n.7, 18 (1945).

we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." App. 25a (emphasis in original). Thus, like the other cases that have applied a screen based on whether the defendant venture has the power to exclude entirely from the market, the Tenth Circuit made the mistake of focusing narrowly on whether the *plaintiff* can survive despite its exclusion, and not on whether that exclusion harms *consumers* by preventing more effective competition in the relevant market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'") (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

Here, the jury specifically found in its special verdict that Visa's Bylaw, which excluded Dean Witter and prevented it from carrying out its desired multi-card strategy, "substantially harm[ed]" not only Dean Witter but also "competition in the relevant market." App 37a. The record established that, despite the numerous members in the charge card market, the entry or expansion of a single large, low-cost producer like Dean Witter would have an important impact on price and output in the market. R. at 693-700, 704-06, 748-52. Moreover, Citicorp's success demonstrates that the ability to offer both proprietary and association cards would enable Dean Witter and all other actual or potential competitors in the market to achieve additional efficiencies and economies of scale and therefore to operate more cost-effectively to the benefit of consumers. R. at 749-54, M687-94, M703-04, M712, M742-43. In sum, the Bylaw created an artificial barrier to competition. Only by ruling out these factors as a matter of law (because none established that Dean Witter was excluded entirely from the market) did the Tenth Circuit reach the untenable conclusion that there was "no evidence" of anticompetitive effect in this case.[20] App. 19a.

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[20] In so holding, the Tenth Circuit disregarded the important principle—recognized by this Court in numerous decisions that did not directly address the issue of a market power screen—that exclusionary restraints can significantly harm competition even where the excluded competitor is not driven entirely from the relevant market. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 n.8, 508-09 (1988) (firm could challenge anticompetitive conduct that "stigma[tized]"

The Tenth Circuit is in conflict not only with the "no screen" and "collective power screen" cases discussed above, but also with the guidelines issued by the federal antitrust enforcement agencies. Consistent with the "collective power screen" cases, the agencies endorse the use of collective market share as a screen in analyzing joint venture restraints under the rule of reason. *See, e.g., 1995 Intellectual Property Guidelines* at S-12 ("safety zone" applies only where "licensor and its licensees collectively account for no more than twenty percent of each relevant market"); *1994 Health Care Guidelines* at S-17 (physician joint ventures with collective shares below 20% are in a "safety zone"). The agencies also recognize the benefits to competition that can be realized when individual joint venture members are free to compete with the venture's product. *See, e.g., id.* at S-16 to S-17 (providing for a larger "safety zone" for "'non-exclusive' physician network joint ventures" that do not prevent their members from competing with the ventures); *United States v. Electronic Payment Services*, 1994 WL 730003 (D. Del. 1994) (consent decree requiring automatic teller network to allow its members to affiliate with competing networks); *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 980-81 (8th Cir. 1981) (upholding FTC determination that joint venture's restriction on competition outside the venture was unlawful), *cert. denied*, 456 U.S. 915 (1982).

The important, outcome-determinative consequences that flow from the circuits' conflicting market power formulations are driven

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its product, "making it difficult . . . to compete"); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market."). *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (citation omitted). Commentators also recognize that exclusionary conduct aimed at disadvantaging competitors can be an exercise of market power that harms competition. *See* Krattenmaker, Lande & Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241 (1987); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

home by a comparison of this case to Dean Witter's parallel case against the MasterCard joint venture. There, on virtually identical facts, the District Court for the Southern District of New York permitted Dean Witter to pursue its Section 1 claim under the rule of reason. Reflecting the Second Circuit's sharp conflict with the market power analysis employed by the Tenth Circuit here, the New York court held that notwithstanding Dean Witter's "modest success in the charge card market," it could challenge its exclusion from MasterCard because "the law is well settled that plaintiffs may file a [Section] 1 claim even though they are able to compete in the relevant market." *MasterCard Int'l Inc. v. Dean Witter, Discover & Co.*, 1993 WL 338213, *4 (S.D.N.Y. 1993).[21]

Commentators have deplored the uncertainty regarding the role and definition of market power in rule of reason cases. One recent study reviewed the harmful impact on the American economy caused by confusion in legal planning for "cooperative arrangements among competitors," stressing that courts "have been split over whether market power must be considered in the rule of reason analysis of horizontal restraints." Piraino, *Reconciling Competition*, *supra*, at 892 & n.87. A sitting Federal Trade Commissioner acknowledged the FTC's own antitrust enforcement dilemmas while "still grappling with questions that the Supreme Court left open in *NCAA* and *BMI*," and observed that "[w]hether a market power screen should be grafted onto the truncated rule of reason or even hung temporarily on one of its branches is truly an important, cutting edge question." Azcuenaga, *Market Power as a Screen in Evaluating Horizontal Restraints*, 60 Antitrust L.J. 935, 944 (1992).

Indeed, commentators have already specifically criticized the mischievous implications of the Tenth Circuit's market power analysis in this case. They have recognized that if large joint ventures in fragmented industries are held to lack market power, then "any [such] joint venture that could find indirect methods to raise price through the use of nonprice rules, including exclusionary conduct, would enjoy immunity under the antitrust laws." Carlton & Frankel, *The Antitrust Economics of Credit Card Networks*,

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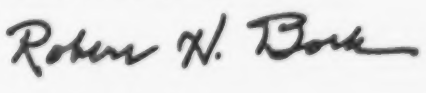
[21] The lawsuit between Dean Witter and MasterCard was later settled.

63 Antitrust L.J. 643, 655 (1995). *See also* Carlton & Salop, *You Keep on Knocking, supra*, at 47-58. This observation underscores the urgent need for the Court to provide authoritative clarification of the proper role and definition of market power in evaluating restraints of trade imposed by joint ventures and other loosely integrated business alliances.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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April 19, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 93-4105
Decided Sept. 23, 1994

SCFC ILC, INC., doing business as MountainWest Financial, Inc.,

Plaintiff-Counter-Defendant-Appellee,

v.

VISA USA, INC.,

Defendant-Counter-Claimant-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, an Illinois corporation; SEARS Consumer Financial Corporation an Illinois corporation,

Counterclaim-Defendants-Appellees.

American Bankers Association; Independent Bankers Association of America; Colorado Bankers Association; Community Bankers Association of Kansas; Community Bankers Association of Oklahoma; Independent Bankers of Colorado; Independent Community Bankers of New Mexico; New Mexico Bankers Association; Kansas Bankers Association; Utah Bankers Association; Wyoming Bankers Association; American Automobile Manufacturer Association; Boulder Technology Incubator; Chevron Corporation; Corning Incorporated; Pacific Telesis Group; Plasticom Industries, Inc.; Rmes Communications, Inc.; American Financial Services Association; Bankcard Holders of America,

Amici Curiae.

Appeal from the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

D.C. No. 91-C-47-B

M. Laurence Popofsky (Stephen V. Bomse, Marie L. Fiala, Renata M. Sos, Robert G. Merritt, Heller, Ehrman, White & McAuliffe, San Francisco, California; Dale A. Kimball, Clark Waddoups, Heidi E.C. Leithead, Kimball, Parr, Waddoups, Brown & Gee, Salt Lake City, Utah, with him on the briefs), Heller, Ehrman, White & McAuliffe, San Francisco, California, for appellant Visa USA.

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Robert H. Bork, Washington, D.C., on the brief for *amicus curiae* American Financial Services Ass'n.

A. Douglas Melamed, Randolph D. Moss, Wilmer, Cutler & Pickering, Washington, D.C.; and Leonard J. Rubin, Bracewell & Patterson, Washington, D.C., on the brief for *amici curiae* American Bankers Ass'n, *etc.*

E. Thomas Sullivan, Tucson, AZ, on the brief for *amicus curiae* Bankcard Holders of America.

Phillip Areeda, on the brief for *amici curiae* American Automobile Mfrs. Ass'n., *etc.*

Before MOORE and SETH, Circuit Judges, and DAUGHERTY, District Judge.*

* Honorable Frederick A. Daugherty, Senior District Judge for the United States District Court for the Western District of Oklahoma, sitting by designation.

JOHN P. MOORE, Circuit Judge.

Visa USA provides payment services to its 6,000 members which individually issue credit cards to consumers. Sears, Roebuck and Company, a competitor offering its own credit card, the Discover Card, wanted to become a Visa USA member and also issue Visa cards. The question presented by this case is whether Visa USA's refusal to admit Sears to its joint venture restrains trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Rejecting Visa USA's legal and factual challenges to the jury's adverse verdict, the district court found the evidence of exclusion constituted antitrust injury and harm to competition. *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 990 (D. Utah 1993). We conclude, however, the exclusion does not trigger section 1 liability and reverse.

I. Background

As set forth more extensively in the district court's order, the factual background of this dispute encompasses the history of the general purpose credit card industry. What is known today "everywhere you want to be" as *Visa* has evolved over the last forty years from direct extensions of credit for a single purpose; for example, oil company or department store credit cards, to a "charge card which could be used for general purposes at a wide variety of retail establishments." *Id.* at 963 n.2. The resulting card was offered without geographic restrictions under the neutral trademark, Visa.

Now, to its approximately 6,000 associates, Visa USA,[1] the umbrella organization, provides technology to process credit card transactions and regulates and coordinates the individual programs through rules and bylaws proposed by management and adopted by a board of directors (the Board).[2] The bylaws cover a range of issues:

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[1] In this opinion, Visa USA designates the joint venture named as the defendant. We refer to its credit cards simply as Visa.

[2] The Visa USA Board draws its members from twelve designated regions, each electing a representative, generally a bank's chief executive officer or chief operating officer. Based on a formula, larger regions may have a second board seat. Seven directors are elected nationally, and a separate seat is reserved for a director who represents small banks. Citicorp

members' liability, termination, and confidentiality, to name a few. However, since its inception, each Visa USA member independently decides the terms and conditions of credit extensions, the number of cards issued, and the interest rates charged. That is, individual banks establish, operate, and promote their own credit card programs under the Visa aegis, while Visa USA serves as a clearinghouse for the ultimate transaction between issuer, consumer, and merchant. The fees members pay to Visa USA for its services vary according to a formula established by the association.

Any financial institution which is eligible for federal deposit insurance may become a Visa USA member. Among its current membership are Citicorp, Ford Motor Company, General Electric, and ITT. Although the membership was originally restricted to exclusively issuing Visa cards, a challenge to the bylaw prohibiting members from issuing MasterCard forced Visa USA to withdraw the rule. See *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). Consequently, Visa USA members now generally offer both Visa and MasterCard, a practice referred to in the industry as *duality*.

Prior to its entry into the general credit card arena, Sears[3] mustered a bankcard steering committee to investigate the alternatives of developing its own general purpose charge card or joining the Visa USA/MasterCard association. In 1985, Sears introduced the Discover Card, its own proprietary card, one "owned and distributed solely by a single business entity," 819 F. Supp. at 963 n.3., to be marketed and issued nationally. This entry was

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has its own seat on the board based on the rule of automatic appointment to any member with more than ten percent of the total volume of outstanding cards. MasterCard board members are not permitted to sit on the Visa USA board.

[3] Sears, Roebuck and Company is the parent corporation of Sears Consumer Financial Corporation and Dean Witter Financial Services Group, its wholly owned subsidiaries. Sears' counsel informed the court during oral argument that Dean Witter then owned plaintiff MountainWest. However, the designation Sears in this opinion collectivizes plaintiff bank and the Sears entities involved in the litigation.

intended to compete with Visa, MasterCard, American Express, and Citibank's Diners' Club/Carte Blanche, the only other national proprietary cards. Despite Visa USA's aggressive efforts to thwart its new rival, *id.* at 963, Discover succeeded with such innovations as preapproved, no fee cards offering cash back bonuses to cardholders and deeper discounts to merchants. In fact, at the time of this litigation, Sears was the largest individual issuer of credit cards in terms of the number of cards distributed and the second largest, following Citicorp, in credit card receivables volume.[4] To compete with the Visa Gold Card and American Express Optima Card, Sears also introduced an upscale Discover Card called Prime Issue. Another Sears' entity, Sears Payment Services (SPS), assists other companies in operating their credit card programs.

In 1988, Greenwood Trust Company, a Sears-owned Delaware bank which issues Discover Card, applied for membership in Visa USA, prompting the Board to adopt the bylaw which is the genesis of this antitrust litigation. The amendment to the Board rule, Bylaw 2.06, stated:

> Notwithstanding (a) above, if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

Subsequently, the Board denied Greenwood Trust's application to Visa USA.

In 1990, the Resolution Trust Corporation sold Sears the assets, including the Visa USA membership, of MountainWest Savings and Loan Association, a bankrupt savings and loan in Sandy, Utah. Sears then created a new entity, SCFC ILC, Inc., doing business as MountainWest Financial, by merging the Sandy bank with Basin Loans, a Utah Industrial Loan Company.

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[4] In 1991, approximately 24 million Discover cards had been issued, while Citicorp had approximately 21 million cards in the market.

Through this vehicle, Sears was poised to inaugurate a national Visa program it dubbed the Prime Option card, a charge card featuring a two-tiered interest rate, 9.9% for the first two months and 15.9% thereafter. To this end, Sears moved Discover's top executives to Prime Option and ordered an initial printing of 1.5 million Prime Option Visa cards. However, upon inadvertently discovering the plan, Visa USA cancelled the printing and invoked Bylaw 2.06 to exclude Sears from the association. Sears then instituted this antitrust litigation.

II. Fed. R. Civ. P. 50(b) Review

In this appeal, Visa USA contends Sears has failed to carry its burden of showing Visa USA's conduct was harmful to competition in violation of section 1. Indeed, Visa USA underscores, the district court conceded had it tried the facts, it "would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out." 819 F. Supp. at 983. Sears, however, urges this fact-intensive case persuaded the jury that preventing consumers access to the Prime Option card and destroying rivals' incentives to develop new proprietary cards harmed competition.

Nonetheless, we focus only on those relevant antitrust facts, which, when viewed most favorably to Sears, underpin our plenary review under Fed. R. Civ. P. 50(b). In the context of this case, if there is evidence upon which a jury could properly find Visa USA restrained trade, we must affirm. 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.07[2], at 50-76 (2d ed. 1994). Naturally, we do not weigh the credibility of the evidence when reviewing the record. However, if the evidence is insufficient "under the controlling law," Fed. R. Civ. P. 50(a), we must enter judgment as a matter of law for the moving party.

Having stated its contrary view, but reluctant to substitute its judgment for that of the jury, the district court articulated those facts which it opined could become the basis for judgment:

1. Testimony of Sears' expert, Professor James Kearl, on the appropriateness of calculating Visa USA's market power by aggregating the individual market shares of Visa USA

and MasterCard; and his conclusion that Visa USA exercised market power through its collective power to make rules; and testimony about the "presence of high profits."

2. Dean Witter's president, Phillip Purcell's testimony had Sears known that developing the Discover Card would disqualify it from Visa USA entry, it would not have placed a new proprietary card in the market.

3. Testimony that no new proprietary cards had been introduced in the relevant market since Bylaw 2.06 was enacted although memberships in Visa USA and MasterCard increased.

4. Testimony that Prime Option "would be a low-cost card which would be supported by powerful marketing and advertising strategies on a national level." 819 F. Supp. at 986-87.

5. Testimony by Sears' executives that Discover Card, in the face of Prime Option's entry, would remain an aggressive competitor.

6. Testimony that intersystem competition will not be harmed "because Prime Option Visa was designed to reach that part of the market that Discover does not reach." *Id.* at 987.

7. Testimony that "Sears would benefit significantly from issuing Prime Option Visa as opposed to Prime Option Discover or another separate proprietary card." *Id.*

This evidence, which the district court found sufficient to impose section 1 liability, however, must be placed in the specialized province of antitrust law and section 1. We do so fully recognizing both the evolving legal precedent and the objectives of antitrust regulation: "to improve people's lives . . . [through] economic efficiency . . . more efficient production methods . . . [and] through increased innovation." Stephen Breyer, *The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 Antitrust L.J. 771 (1989). That antitrust objectives often collide with these goals simply

reminds us "[a]ntitrust is an imperfect tool for the regulation of competition." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 39 (1984).

III. Joint Ventures and Section I

Section 1 forbids agreements in restraint of trade.[5] Read costively, Section 1 might prohibit "every conceivable contract or combination . . . anywhere in the whole field of human activity." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 516, 55 L. Ed. 619 (1911). However, "the 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (citing 7 P. Areeda & D. Turner *Antitrust Law* ¶ 1500, at 362-63 (1978)), *cert. denied*, 488 U.S. 1007 (1989). Hence, when we ask if a particular practice is "reasonable" or "unreasonable," or if the practice is "anticompetitive," we use these terms with special antitrust meaning reflecting the "Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." *Id.* at 486. In this lexicon, a practice ultimately judged anticompetitive is one which harms competition, not a particular competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20, 82 S.Ct. 1502, 1521-21, 8 L.Ed.2d 510 (1962).

Of course, reasonability is of no consequence when certain practices, for example, price fixing, are entirely void of redeeming competitive rationales. These we deem *per se* illegal under section 1, no offsetting economic or efficiency justifications salvaging them. "This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pacific*

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[5] In part, section 1 states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Stationery & Printing Co., 472 U.S. 284, 289, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985).

The sharp line between *per se* and rule of reason analysis, however, especially blurs under section 1 when the actors change. In the case of a joint venture, present here in the Visa USA association, competitive incentives between independent firms are intentionally restrained and their functions and operations integrated to achieve efficiencies and increase output. *See* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1524 (1982). Although virtually any collaborative activity among business firms may be called a joint venture, joint ventures differ from mergers and cartels

> by the extent to which they integrate the resources of their partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources. In a joint venture, partners contribute assets, such as, capital, technology, or production facilities to a common endeavor. This integration of resources creates economic efficiencies that cannot be achieved by naked agreements among competitors. Indeed, the efficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste. Joint ventures, however, differ from mergers in a critical way: because they are less integrated than mergers, *they allow their partners to continue to compete with each other in the relevant market.*

Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L.Rev. 1, 7 (1991) (italics added). The whole becomes greater than the sum of its parts. However, at its center remains an agreement among competitors to eliminate competition in some way.

The Supreme Court has recognized this tension in its evolving treatment of allegedly anticompetitive agreements by joint ventures. In *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) *(BMI)*, the Court refused to condemn under a *per se* analysis blanket licenses which amounted to

price fixing among the participants. The joint venture, the American Society of Composers, Authors and Publishers (ASCAP), was created as a clearinghouse through which individual music copyright owners licensed their compositions, and ASCAP then monitored the use of their work. Virtually all participants in the copyright music market participated in ASCAP. However, eschewing *per se* treatment, the Court acknowledged, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23, 99 S. Ct. at 1564. Viewed in this light, the efficiency justification of increasing the aggregate output in the market rendered the agreement procompetitive.

Similarly, in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court held inappropriate the application of *per se* treatment to the NCAA's horizontal price fixing and output limitation of the number of games college football teams could negotiate to televise. Again the Court recognized the horizontal restraint on competition was essential to make the product available at all. *Id.* at 101, 104 S.Ct. at 2960. Under a rule of reason analysis, however, the rule decreased output and had the effect of increasing prices. While cooperation may be necessary and justified, the Court suggested it fit a different mold, such as, "rules defining the condition of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117, 104 S.Ct. at 2969.

Finally, in *Northwest Wholesale Stationers*, 472 U.S. at 284, 105 S.Ct. at 2613, the Court looked at the economic efficiency justifications of a joint purchasing cooperative to determine the anticompetitive effect of its expelling a member who did not comply with one of the cooperative's rules. Rejecting *per se* condemnation, the Court suggested the disclosure rule which excluded plaintiff from membership might be necessary to monitor the creditworthiness of the cooperative's members. "Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. . . . Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an

anticompetitive effect is not warranted." *Id.* at 296, 105 S.Ct. at 2620-21 (citations omitted).

In rejecting automatic *per se* treatment in these joint venture cases,[6] the Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price. Underlying these cases is an effort to appreciate the economic reality of the particular business behavior to assure that the procompetitive goals, in fact, are neither undervalued nor mask a reduction in competition. Key to the analysis of "the competitive significance of the restraint," *NCAA*, 468 U.S. at 103, 104 S.Ct. at 2961 (quoting *National Soc'y of Professional Eng'r v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978)), is the Court's appreciation that the horizontal restraint may be essential to create the product in the first instance. That understanding properly values the proprietary rights and incentives for innovation embodied by the joint venture as well as concerns about free-riding, "the diversion of value from a business rival's efforts without payment." *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir.), *cert denied*, __U.S.___, 113 S. Ct. 409, 121 L.Ed.2d 334 (1992).

We do not read the Court's precedent involving joint ventures to imply any special treatment or differing antitrust analysis.[7] Indeed, aside from clarifying the inappropriateness of automatically invoking *per se* scrutiny of a joint venture's alleged antitrust violation, the Court has not articulated a different rule of reason approach. Thus, under the Court's precedent, cooperative business activity in one setting may permit its participants to achieve market efficiencies or

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[6] *BMI, NCAA,* and *Northwest Wholesale Stationers* are emblematic and not intended to be all inclusive or exhaustive of the extant Supreme Court precedent on joint ventures under section 1.

[7] We would note, however, some of the commentary on the antitrust treatment of joint ventures suggests a different approach. *See, e.g.*, Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason Or Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1 (1992); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523 (1982).

economies of scale, while in another, a similar activity might run afoul under rule of reason review.

Again, in the context of section 1, the focus of the procompetitive justifications for the business practice remains the ultimate consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers. *Stamatakis Indus., Inc. v. King*, 965 F.2d 469 (7th Cir. 1992). That concept cannot be overemphasized and is especially essential when a successful competitor alleges antitrust injury at the hands of a rival. Indeed, "[w]henever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing." *Chicago Professional Sports*, 961 F.2d at 670.

IV. Market Power

Rule of reason analysis first asks whether the offending competitor, here Visa USA, possesses market power in the relevant market where the alleged anticompetitive activity occurs. The answer to that question may end the suit or permit an abbreviated rule of reason inquiry.

Broadly, market power is the ability to raise price by restricting output.[8] "[I]n economic terms [it] is the ability to raise price without a total loss of sales." 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 501, at 322 (1978). Without market power, consumers shop around to find a rival offering a better deal. Indeed,

> if we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers.

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[8] The 1984 Department of Justice Merger Guidelines define market power as "[t]he ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time." *U.S. Dept. of Justice Merger Guidelines* (1984), *reprinted in 4 Trade Reg. Rep.* (CCH) ¶ 13,103 at 20,556.

George A. Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 808 (1992) [hereinafter *Market Power*].

Consequently, whether a firm possesses market power may facilitate the determination that the practice harms competition and not simply a single competitor. Proof of market power, then, for many courts is a critical first step, or "screen," or "filter,"[9] which is often dispositive of the case. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666-67 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987). If market power is found, the court may then proceed under rule of reason analysis to assess the procompetitive justifications of the alleged anticompetitive conduct. *National Bancard Corp. (NaBanco) v. Visa, U.S.A.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

While this approach is "the norm under Section 2 of the Sherman Act, where a firm cannot be found liable unless it has achieved monopoly power or there is a dangerous probability of its doing so," *Market Power*, at 808, this two-step analysis has become equally helpful under section 1.[10] *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Ball*

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[9] These screens or filters are presumptions in antitrust analysis. They "help to screen out cases in which the risk of loss to consumers and the economy is sufficiently small that there is no need of extended inquiry and significant risk that inquiry would lead to wrongful condemnation or to the deterrence of competitive activity as firms try to steer clear of the danger zone." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 17 (1984). These "simple rules [ ] will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury." *Id.*

[10] Again, we recognize the overlaps in analysis between section 1 and section 2 cases as did the district court. Nevertheless, the differences must be underscored, the former involving conduct that doesn't alter market structure; the latter, "a pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986).

The market power query begins with the determination of the relevant market, "that is, a market relevant to the legal issue before the court." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.1c, at 535 (Supp. 1993) [hereinafter 1993 Supplement]. "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). We also look to the geographic reach of the group of sales or sellers to determine the relevant market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). Further, "[b]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage*, 792 F.2d at 218.

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

Id. (quoting L. Sullivan, *Antitrust* § 12, at 41 (1977)).

Although these concepts provide a shorthand for rule of reason analysis, we would be amiss to imply their application is necessarily facile. Each may be problematic:

> There is no subject in antitrust law more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify–for working purposes–the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in

> reality has different costs, needs, and substitutes. Further, when lawyers and judges take hold of the concept, they impose on it nuances and formulas that reflect administrative and antitrust policy goals. This adaption is legitimate (economists have no patent on the concept), but it means that normative and descriptive ideas become intertwined in the process of market definition.

United States Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598 (1st Cir. 1993). By defining the relevant market, however, we identify the firms that compete with each other. Plugged into the market power inquiry, we may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

V. Issuer Market

This case illustrates both the utility and difficulties of the market power tool. In this lawsuit, Sears and Visa USA stipulated "the relevant market is the general purpose charge card market in the United States." 819 F. Supp. at 966. Presently, the only participants in this market are Visa USA, MasterCard, American Express, Citibank (Diners Club and Carte Blanche), and Sears (Discover Card). Competition among these five firms to place their individual credit cards into a consumer's pocket is called *intersystem*. "Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19, 97 S.Ct. 2549, 2558 n.19, 53 L.Ed.2d 568 (1977).

In its complaint, Sears alleged the amendment to Bylaw 2.06 represented a concerted refusal to deal which unreasonably restrained trade in the general purpose charge card market. The parties agreed, and the testimony clearly established that in this relevant market competition occurs only at the issuer level. That is, to the extent that Visa USA is in the market, it operates in the *systems* market, not the *issuer* market. Its *members* issue cards, competing with each other to offer better terms or more attractive features for their individual credit card programs. This is *intrasystem* competition.

The issuer market, thus, remains atomistic, each issuer financial institution, bank, or other entity being independent from another.[11] Although Sears does not dispute this characterization of the market, it contends it attempted to launch its Prime Option program under the Visa aegis to "compete more effectively" at the issuer level. By offering multiple credit cards, Discover and Prime Option Visa, Sears contended it would then "strengthen competition."

If the general credit card issuer market is the relevant market, however, the evidence the district court relied upon to deny the Rule 50(b) motion belies Sears' contention and calls into question the definition of relevant market the court apparently adopted. First, the district court recounted the market shares of each intersystem competitor: "Visa was estimated to possess 45.6% of the nationwide general purpose charge card market; MasterCard, 26.4%; American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%." 819 F. Supp. at 966 (footnote omitted). Within Visa USA's intersystem share, aggregated to include MasterCard issuers as well, the district court noted the evidence showed "in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately $42.5 billion in charge volume in 1991–representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market." *Id.* at 966 n.8.

While these raw figures may suggest Visa USA possesses market power in the intersystem market, the parties have established a different paradigm. By their agreement, the context of this case was intended to focus on the issuance of credit cards as the relevant market. Indeed, that is the market the district court defined for the

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[11] Although approximately 6,000 financial institutions separately are issuers in the association, setting fees, interest rates, and other conditions, approximately 19,000 "participating members" offer cards under their own names and utilize the services of their issuing bank. Robert E. Litan, *Consumers, Competition, and Choice, The Impact of Price Controls on the Credit Card Industry*, March 1992.

jury. To determine, therefore, whether Visa USA possesses market power, we must compare *issuers*, the point where both Sears and Visa USA agreed they compete. At that level, testimony from both Sears and Visa experts established Discover Card is the second largest issuer preceded only by Citicorp in terms of charge volume, that is, what consumers owe on their credit cards.

Based on the district court's figures, Citicorp's charge volume represented about 15.8% of the Visa/MasterCard market share, aggregated at 72% of the general purpose credit card market. If we compare issuers' charge volume, our calculations demonstrate Citicorp's is 21.9% in the relevant market, while that of Sears Discover Card is 5%. Neither figure reflects *at the issuer* level that Visa USA through its members possesses market power.

Nevertheless, Sears' expert, Dr. James Kearl, upon whom the district court relied to conclude the evidence was sufficient to establish Visa USA's market power, explained he looked at the collective, aggregated shares of Visa and MasterCard, because "we have a collective rule, bylaw 2.06 . . . I found that the collective share was very large, and as a consequence my conclusion was that the collective rule was *an exercise of market power*." (italics added). Dr. Kearl opined the association members

> have both incentive and the ability to exercise that market power. They have the incentive because this market share was large and they want to protect that market share. And they also had the incentive because since this is large, *if they can keep prices up or from falling they can make a lot of money*.

(italics added).

Second, despite the stipulation on the relevant market, "the market relevant to the legal issue before the court," *1993 Supplement*, at 535, the testimony reflects that Sears, in fact, sought to expand its competition not specifically in the general purpose credit card market but in a segment of that market represented by financial institutions or banks. For example, Sears' executive, William O'Hara, stated, "We were trying to compete *in that segment* of the general purpose credit card market called the bank association segment." (emphasis

added.) Visa USA's witness, Richard Rosenberg, explained he voted for Bylaw 2.06, believing that because a non-bank like Dean Witter did not have to comply with certain requirements imposed on banks like the Community Reinvestment Act, Sears would have a competitive advantage over its bank rivals.

Indeed, albeit the stipulation, as the trial progressed, the "relevant market" devolved into *Visa USA's share* of the defined market. Thus, the legal issue was transformed, equating exclusion from Visa USA to exclusion from the market.[12] The evidence, however, does not support this mutation. The district court recognized five active rivals presently compete at the intersystem level. Of that market, for example, Citicorp represents 21.9%, American Express 20.5%, and Sears 5%. At the issuer level, where intrasystem competition occurs, the court found, and the parties' experts agreed, the market is remarkably unconcentrated.[13] Given the wide range of interest rates and terms offered by various issuers and Sears' recognized intersystem strength, we are at a loss to find the evidence to support the district court's contrary conclusion.

From this standpoint, even if Visa USA possesses market power, Dr. Kearl's testimony that Visa USA exercised that market power in *its ability* to make collective rules misses the point in the context of joint ventures. "A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of

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[12] This revision of the market distinguishes this case from *Reazin v. Blue Cross Blue Shield of Kan.*, 899 F.2d 951 (10 Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), upon which Sears relies.

[13] Ironically, the district court rejected Visa USA's argument that the present market is highly concentrated, such that admitting Sears would constitute a violation of section 7 of the Clayton Act. After discussing the Herfindahl-Hirschman Index (HHI), which is used to determine market concentration, the district court rejected Visa USA's aggregation of market shares, stating "the court agrees with Visa's expert Professor Schmalensee that *each* individual issuer of Visa and MasterCard cards should be included in the HHI analysis, resulting in a system HHI of below 500." *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 994 (D. Utah 1993). This figure represents an unconcentrated market.

the venture." *Rothery Storage*, 792 F.2d at 230. The very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making. However, the Court has made clear, as previously discussed, cooperative conduct alone is not prohibited.

Hence, it is not the rule-making *per se* that should be the focus of the market power analysis, but the effect of those rules–whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. Although Dr. Kearl testified "if they can keep prices up or from falling they can make a lot of money" to support his conclusion Visa USA possesses market power, there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.

Thus, without any eye on effect, the very exercise of rule-making became the factual basis for rule of reason condemnation of Bylaw 2.06. Consequently, rule-making was not only divorced from its functional analysis but also from the facts of the case. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, __U.S__, __, 113 S. Ct. 2578, 2598, 125 L.Ed.2d 168 (1993). In this complex area, the Court cautioned, "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Id.*

We believe the evidence cited by the district court to conclude Visa USA possessed market power is insufficient as a matter of law. Although the district court did not end its rule of reason inquiry upon that finding, the conclusion set the path for its uncharted journey upon a landscape of speculation, conjecture, and theoretical harm. The consequence is the finding of liability based on tendentious and conclusory statements, none of which amounts to evidence of restraint of trade.[14]

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[14] In particular, Sears, disincentive argument provides the widest array of speculation and raises concerns about its standing to represent the

VI. Efficiency Justifications

We therefore return to the two-step analysis previously discussed to assess the procompetitive justifications of Bylaw 2.06 to counteract Sears' allegation the restraint is unreasonable. Visa USA maintained it instituted Bylaw 2.06 to protect its property from intersystem competitors who otherwise would enjoy a free ride at this time of entry. Its general counsel, Bennett Katz, described technological advancements Visa USA achieved and incentives for innovation to system-wide competition generated. In a letter informing Sears of the Board's action, he stated, "As I indicated to you by phone, we believe that intersystem competition should be preserved and enhanced; membership by Greenwood Trust Co. would have the opposite effect." Describing the industry as small, "we only have three basic competitors . . . Visa and MasterCard . . . American Express and Discover," Katz expressed concern about government regulation if the existing competition diminished or Visa USA became too large.[15] In addition, there was testimony that after duality was permitted, MasterCard and Visa competed less aggressively, consumers regarding the two cards often as interchangeable. Other witnesses expressed concern, for example, about Sears' threat to their own profits; the effect a big player like Sears would have on the many small banks that compete in the Visa USA association; and Sears' likely ability to become a Board member and privy to confidential information.

Against these justifications, Sears offered testimony about a two-stage strategy in which it had always planned to enter the market first with its Discover Card and then with a low-cost Visa card; that marketing the Prime Option card as a Discover Card program would not meet the objectives of "Sears' branding strategy," and that consumers would be harmed by being denied the opportunity to select a Prime Option Visa card from the possible choices in the general charge card market. Broadly, Sears promised a low-cost,

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supposed injury of others hoping to start up proprietary charge cards. Nevertheless, the parties each shared in charting the court's terrain.

[15] In testimony, Katz explained, not only was Justice Department scrutiny a concern, but also "attorneys general around the country who had been looking at Visa and deciding whether it is too large."

competitive alternative to the existing market's cards and elicited, through expert testimony, the prospect of other similarly situated potential intersystem competitors being excluded and discouraged from offering new rival cards because of Bylaw 2.06.

Most of this evidence relied upon by the district court is irrelevant to the central antitrust question posed, however. First, intent to harm a rival, protect and maximize profits, or "do all the business if they can," *Ball Memorial Hosp.*, 784 F.2d at 1325, is neither actionable nor sanctioned by the antitrust laws. "Competition, which is always deliberate, has never been a tort, intentional or otherwise." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987). "Most businessmen don't like their competitors or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money." *Id.* Thus, evidence that a Board member voted for Bylaw 2.06 to discourage price competition within Visa USA may reveal a mental state but is not an objective basis upon which section 1 liability may be found. If Bylaw 2.06 is not "objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.* (citation omitted).

What we ask under section 1 is whether the alleged restraint is reasonably related to Visa USA's operation and no broader than necessary to effectuate the association's business. *NaBanco*, 779 F.2d at 592, 601. That is, is Bylaw 2.06 ancillary, "subordinate and collateral . . . [making] the main transaction more effective in accomplishing its purpose," which is to provide credit card services to its members? *Rothery Storage*, 792 F.2d at 224. If it is not ancillary, does it restrain trade in a manner which alters the structure of the general purpose credit card market and, thus, harms consumers?

We think the analysis in *Rothery Storage* helps us resolve this question. There, Atlas Van Lines adopted a new policy to prohibit any affiliated company from handling interstate hauling both under its own name as well as under the Atlas name. The policy was intended to prevent its affiliates from using Atlas equipment,

facilities, and services for interstate hauling while independently negotiating contracts for their own accounts.[16] Atlas announced the rule was necessary to prevent its agents from benefiting from a free ride, increasing Atlas' liability for interstate shipments while using Atlas' resources without any attendant return of revenue.

> Atlas has required that any moving company doing business as its agent must not conduct independent interstate carrier operations. Thus, a carrier agent, in order to continue as an Atlas agent, must either abandon its independent interstate authority and operate only under Atlas' authority or create a new corporation (a 'carrier affiliate') to conduct interstate carriage separate from its operation as an Atlas agent. Atlas' agents may deal only with Atlas or other Atlas agents.

Id. at 217.[17] Several Atlas carrier agents claimed the policy constituted a group boycott and filed a complaint under section 1.

After a thorough and well-reasoned analysis, the D.C. Circuit rejected plaintiffs' claim, based not simply on the evidence Atlas did not possess market power in the market for the interstate carriage of used household goods, but also on the conclusion the new rule was ancillary to Atlas' main enterprise, enhancing consumer welfare by creating efficiency. *Id.* at 223. What improved the company's efficiency, the court found, was the elimination of the free ride:

> The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride. There is, on the other hand, no possibility that the restraints can suppress market competition and so decrease output.

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[16] The new policy responded as well to deregulation of the moving industry. Although regulatory constraints figured in the analysis, the resolution of the central issue was not dependent on that context.

[17] That is, its interstate rivals can no longer compete in interstate hauling both as Atlas agents and as independent agents. The policy, then, is analogous to the rule at issue here.

Id. at 229. This conclusion was built on the foundation of *BMI*, *NCAA*, and *Northwest Wholesale Stationers*.

Similarly, Visa USA urges its concern about protecting the property it has created over the years and preventing Sears and American Express,[18] successful rivals, from profiting by a free ride does not represent a refusal to deal or group boycott but is reasonably necessary to ensure the effective operation of its credit card services. It urges Bylaw 2.06 avoids "free-riding, an unlevel playing field, and the added costs that Sears would impose on VISA members by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against." Visa USA contends Sears does not need Visa USA to compete in the relevant market and cannot demonstrate it can only issue a low-cost card with Visa USA's help.

Sears urges the justification is pretext. "In this case, the issue is whether the selective exclusion imposed by Visa's Bylaw 2.06 is ancillary to Visa's legitimate purposes as an open industry association." Sears contends Visa USA is a network joint venture, one whose integrative efficiencies actually grow as its membership increases. To accept Visa USA's analogy to a research venture, one expending individual talent and resources in a small laboratory only to be forced to include rival researchers, Sears argues, is naive. It protests everyone gets into Visa USA except Sears itself. In support, Sears relies on the bulwarks of exclusionary conduct cases.

We do not believe either precedent or policy compels Sears' position, however. For example, *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (joint venture railroad companies that acquired Terminal Company, which controlled bridge across Mississippi River, approaches, and terminal at St. Louis, must admit rivals to permit use of facilities on nondiscriminatory terms), involved a "most extraordinary" situation in St. Louis, "and we base our conclusion in this case, in a large measure, upon that fact." *Id.* at 405, 32 S.Ct. at 513-14. In that setting, mandating the combined railroad companies admit their competitors merely permitted joint ownership of common facilities.

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[18] We note that American Express has never participated in this lawsuit.

"The defendants had not built or created anything except a combination to take over existing facilities." *1993 Supplement* ¶ 736.1, at 841.

Similarly, *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (joint venture news gathering agency must provide reasonable access to excluded firms), never stated a joint venture cannot exclude anyone. The Court's prohibition of the membership restriction was focused particularly on the operation of the rule itself, where an individual Associated Press member could singly veto a rival's access to its local market. More importantly, the joint venture, "the largest news agency," was factually unique: its news gathering and dissemination capacity could not be duplicated and represented in and of itself a limitation on nonmembers. *Id.* at 13, 65 S.Ct. at 1421.[19]

We would also distinguish the much-quoted language in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (ski company's decision not to participate in an all-mountain lift ticket violated section 2). In that case, defendant ski company justified its refusal to continue offering an all-mountain lift ticket by asserting it had no duty to engage in joint marketing with a competitor. The Court responded by observing:

> The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Id. at 601, 105 S.Ct. at 2856 (footnote omitted). In qualifying that right, the Court noted in the context of section 2 the refusal to deal had the effect of making "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years . . . Ski Co.'s decision to terminate the all-

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[19] *Terminal Railroad* and *Associated Press* are the roots of the essential facility analysis in antitrust. See Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1990).

Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market." *Id.* at 603-04, 105 S.Ct. at 2858.

None of these conditions is present in this case. Bylaw 2.06 did not alter the character of the general purpose credit card market or change any present pattern of distribution. *Id.* Nor did it bar Sears from access to this market. There was no evidence Sears could only introduce a Prime Option card with Visa USA's help or that Visa USA's exclusion from its joint venture disabled Sears from developing its new card under the Discover mantle. More importantly, there was no evidence the bylaw harms consumers, the focus of the alleged violation. Indeed, the evidence established the current market in general purpose credit cards is structurally competitive, issuers targeting different consumer groups and consumer needs. In this market, Sears already competes vigorously. Surely, if its goal is to compete *more effectively* in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects. "[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other." *Stamatakis Indus.*, 965 F.2d at 471.[20]

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[20] Indeed, when the question becomes whether the restraint is reasonably necessary to achieve the joint venture's goals, "[e]xclusivity of venture membership will not generally be regarded as suspect." *1993 Supplement* ¶ 1506, at 1115. The Department of Justice has stated:

> [S]electivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint ventures to open membership to all competitors (or to license the product of an R&D joint venture to all who seek licenses) would decrease the incentives to form joint ventures . . . For example, the inability to exclude those who would bring little or nothing to the joint venture, or those who would fail to share fully in the risks, would decrease the efficiency of the joint venture and reduce the expected reward from successfully accomplishing the joint venture's mission. An enforcement policy that denied a joint venture the ability to select its members might also encourage firms to forego risky endeavors in the hope of being able to gain access through antitrust litigation to the fruits of the successful endeavors of others. Thus, the

Given Visa USA's justification the bylaw is necessary to prevent free-riding in a market in which there was no evidence price was raised or output decreased or Sears needed Visa USA to develop the new card, we are left with a vast sea of commercial policy into which Sears would have us wade. To impose liability on Visa USA for refusing to admit Sears or revise the bylaw to open its membership to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents Sears imagines Visa USA has wrongly created, we believe can be better corrected by the marketplace itself. The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare.

VII. Conclusion

Reversal of the district court's order denying Visa USA's Rule 50(b) motion further dissipates the preemptive strike Visa USA attempted by requesting injunctive relief under section 7 of the Clayton Act. The reasoning which underpins our reversal of the district court's order and leaves the present entities in the market unchanged obviates scrutiny under section 7 of the Clayton Act. The district court properly denied relief.

We therefore **REVERSE** the district court's order holding Visa USA liable under section 1 of the Sherman Act. However, we **AFFIRM** its denial of an injunction to Visa USA under section 7 of the Clayton Act for reasons consistent with this opinion.

> Department [of Justice] generally will be concerned about a joint venture's policy of excluding others only if (i) an excluded firm cannot compete in a related market or markets . . . in which the joint venture members are currently exercising market power without having access to the joint venture and (ii) there is no reasonable basis related to the efficient operation of the joint venture for excluding other firms.

Justice Department, International Operations Antitrust Enforcement Policy 42 (Nov. 10, 1988) (CCH Supp.) (quoted in *1993 Supplement* ¶ 1506, at 1115).

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

Docket No. 91-C-47B
Decided April 1, 1993

SCFC ILC, INC., d/b/a MountainWest Financial,

Plaintiff,

v.

VISA U.S.A. INC.,

Defendant.

VISA U.S.A. INC. and Visa International Service Association, Delaware corporations,

Counterclaimants,

v.

SEARS, ROEBUCK AND CO., a New York corporation; Sears Consumer Financial Corporation; and SCFC ILC, Inc., d/b/a MountainWest Financial,

Counterdefendants.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, IL, Carol Clawson, Richard W. Giauque, Salt Lake City, UT, for plaintiff.

M. Laurence Popofsky, Stephen V. Bomse, San Francisco, CA, Clark Waddoups, Dale A. Kimball, Heidi E. Leithead, Salt Lake City, UT, Renata M. Sos, San Francisco, CA, Scott R. Ryther, Salt Lake City, UT, for defendant.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, IL, Richard W. Giauque, Salt Lake City, UT, Charles A. Tausche, Reuben L. Hedlund, Chicago, IL, for counterdefendant Sears Roebuck & Co.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, James H. Gale, Randall A. Hack, James D. Sonda, Chicago, IL, Richard W. Giauque, Salt Lake City, UT, for counterdefendant Sears Consumer Financial Corp.

Stephen V. Bomse, Marie L. Fiala, San Francisco, CA, Clark Waddoups, Dale A. Kimball, Heidi E. Leithead, Salt Lake City, UT, Judith Z. Gold, Susan Rice, Robert G. Merritt, San Francisco, CA, Scott R. Ryther, Salt Lake City, UT, Renata M. Sos, San Francisco, CA, for counterclaimant Visa USA Inc.

OPINION AND ORDER

BENSON, District Judge.

Following a jury verdict in favor of the Plaintiff, a post-trial hearing was held Tuesday, December 22, 1992. The court heard argument on several motions, including: (1) Visa's Motion for Judgment as a Matter of Law under Rule 50(b) of the Federal Rules of Civil Procedure; (2) Visa's Motion for Entry of Judgment on its Clayton Act Counterclaim; and (3) Visa's alternative Motion for New Trial or Conditional New Trial. Sears, as Plaintiff and Counter-defendant, was represented by William H. Pratt and Gary F. Bendinger. Visa, as Defendant and Counterclaimant, was represented by M. Laurence Popofsky, Stephen V. Bomse, Marie L. Fiala, Dale A. Kimball, and Clark Waddoups. Having considered the memoranda, submissions of the parties, and oral argument, the court enters this Opinion and Order.

BACKGROUND

The Plaintiff in this lawsuit is MountainWest Financial, a wholly-owned subsidiary of Sears Consumer Financial Corporation and Dean Witter Financial Services Group, which are themselves

wholly-owned subsidiaries of Sears, Roebuck and Co.[1] The Defendant is Visa U.S.A., Inc. ("Visa"), a non-stock corporation owned by approximately 6000 banks and other financial institutions located throughout the United States.

Visa's history dates back to the late 1950s when Bank of America began issuing the BankAmericard to consumers through an organization of approximately 70 bank franchises. The BankAmericard was the predecessor to the current Visa charge card. A second charge card association, Interbank, was formed and competed directly with BankAmericard. Interbank is now known as MasterCard.

Visa is a form of a joint venture governed by a board of directors which is comprised of bank executives selected from member banks. Visa divides the United States into twelve regions. Member banks in each region elect one director to the board. Large regions are represented by more than one director. In addition, one director is elected by the small banks to represent their interests. Furthermore, any member with more than ten percent of the total volume of outstanding Visa cards receives an automatic position on the Board.

The Visa association itself does not issue charge cards. It provides services to its members, including general advertising and computer services. Visa cards are issued by the individual members. Each of the 6000 members is allowed to set its own terms, deciding what prices to charge and the number of cards to issue.

When the Visa association was formed, its rules prevented members from also belonging to MasterCard. In 1974, a bank in Little Rock, Arkansas, sued for the right to issue both Visa cards and MasterCard cards. *See Worthen Bank & Trust Co. v. National Bankamericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). In response, Visa sought advice from the United States Department of Justice to determine whether this prohibition could be considered an antitrust violation. The Justice Department responded by stating that, on the card-issuing level, such

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[1] During trial and in previous decisions, the court has referred to the plaintiff as "Sears." In this Opinion, the court will continue that practice.

a "prohibition of dual affiliation appears unobjectionable." (Def.'s Ex. 102, at 2). With respect to the enlistment of merchants willing to accept the Visa card, however, the Justice Department's opinion was that the bar to dual membership could handicap efforts to create new bank credit card systems and might diminish competition. In other words, the Department of Justice found no problem with prohibiting a bank from issuing both Visa and MasterCard cards, but prohibiting dual affiliation by those banks responsible for signing merchants could pose an antitrust problem. As a result, the Department of Justice concluded that it could not promise that a civil action against Visa would not be initiated if Visa continued to refuse its members the right to issue MasterCard charge cards. In response, Visa withdrew its rule, settled the lawsuit, and allowed its members to also become members of the MasterCard association. Thereafter, most banks and other financial institutions in the United States became members of both Visa and MasterCard. Presently, most Visa members also issue MasterCard cards, a practice known as "duality." Visa contended in this action that as a result of duality, competition between Visa and MasterCard diminished significantly.

In 1982, Sears began investigating an entrance into the general purpose charge card market.[2] Sears had discussions with Visa about the possibility of Sears' issuing a nationwide Visa card. Sears organized a steering committee to recommend a strategy. The committee considered Sears' becoming a member of Visa or MasterCard. The committee also considered developing a new general purpose charge card. In late 1984, Sears decided not to pursue issuing a Visa card at that time, but instead decided to launch

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[2] The general purpose charge card market was defined at trial as consisting of any charge card which could be used for general purposes at a wide variety of retail establishments. Gasoline charge cards, department store charge cards, and other charge cards accepted only at limited locations were not considered to be general purpose charge cards. At the time Sears began its investigation there were five general purpose charge cards distributed nationwide: Visa, MasterCard, American Express, Diners Club, and Carte Blanche.

its own proprietary card[3]–the Discover Card. The Discover Card was introduced in Atlanta, Georgia, in late 1985, and was issued nationally in 1986.

Visa perceived the Discover Card as a direct competitor and made numerous attempts to limit the Discover Card's success. For example, Visa encouraged its member banks to deny the Discover Card access to Visa's merchant card terminals. This strategy forced Sears to develop its own terminals and to offer them to merchants at competitive prices. Thereafter, Visa refused to allow its merchants to process Visa transactions on a Discover Card terminal.[4] Despite Visa's efforts, however, Discover continued to grow and prosper.[5]

In late 1988, Sears applied for membership in Visa through Greenwood Trust Co., a Delaware bank owned by Sears. Sears claims that its primary reason for applying for membership was in response to the competitive actions Visa had undertaken with respect to the Discover Card. In June, 1989, Visa's Board of Directors held a meeting in Cannes, France. At the meeting, the Board considered and unanimously rejected Greenwood Trust's application for membership. The Board also passed an amendment to its bylaws prohibiting Sears, or any other direct competitor, from becoming a

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[3] Proprietary cards were defined at trial as charge cards owned and distributed solely by a single business entity. At the time Sears entered the general purpose charge card market with the Discover Card in 1985, the only other issuers of proprietary general purpose charge cards were American Express and Citibank (Diners Club/Carte Blanche).

[4] Eventually Visa and Sears resolved their disputes regarding the use of terminals, allowing merchants to use the same terminals for both cards.

[5] The evidence at trial indicated that the Discover Card is one of the most effective competitors in the general purpose charge card market. The Discover Card has surpassed its business projections in every year of its existence, earning $80 million in net income in 1989, $117 million in 1990, and $170 million in 1991. (Def.'s Ex. 571). Discover Card has been referred to as "one of the two or three most remarkable success stories in American business in the late 1980s[.]" (Tr. at 256).

Visa member. The following is an excerpt from the official minutes of the meeting of the Board, dated June 5-6, 1989:

> Greenwood Trust Company has made application for Principal membership in the corporation. Greenwood Trust Company is the issuer of Discover cards and has no intention of converting that program; rather, they intend to issue both Discover cards and Visa Cards. In order to preserve and enhance interbrand competition, and upon motion duly made, seconded and unanimously carried, it was
>
> **RESOLVED,** that Section 2.06 of the By-Laws be and are hereby amended by adding the following sentence at the end of that Section as follows:
>
> > "Notwithstanding (a) above, if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards."

(Pl.'s Ex. 715)

In a letter advising Sears of the Board's action, Visa General Counsel Bennett Katz stated: "[W]e believe that intersystem competition should be preserved and enhanced; membership by Greenwood Trust Co. would have the opposite effect." (Pl.'s Ex. 715). Sears contested Visa's rejection of its application. Sears' officers met with Visa board members in an attempt to resolve the situation, but Visa refused to change its position. Sears threatened antitrust litigation, but took no legal action at that time.

On May 25, 1990, Sears purchased the assets of a small, defunct Utah savings and loan association known as MountainWest Savings & Loan ("MountainWest Savings"). The purchase was made through the Resolution Trust Corporation ("RTC"), which had become the receiver of MountainWest Savings after its failure. Sears merged the

assets of MountainWest Savings into those of Basin Loans, a Utah Industrial Loan Company, and renamed the new entity SCFC ILC, Inc., doing business in Sandy, Utah, as "MountainWest Financial."

One of the assets of MountainWest Savings that Sears acquired from the RTC was MountainWest Savings' membership in the Visa association. MountainWest Savings had become a Visa member in 1982 and had issued approximately 5800 Visa charge cards to its account holders. Notwithstanding Visa Bylaw 2.06, Sears attempted to use MountainWest Financial's Visa membership to launch a special low-interest, Sears-owned Visa card called "Prime Option." Under the Prime Option program, Sears intended to issue millions of Visa cards nationwide. Sears initially requested a printing of 1.5 million Prime Option Visa cards. Upon learning, rather belatedly, of Sears' involvement with MountainWest Financial, Visa refused to grant permission for the initial printing of the Prime Option Visa cards based on Bylaw 2.06's prohibition of Sears' membership in Visa.[6]

In response to Visa's refusal to approve MountainWest Financial's request, Sears filed a five-count Complaint against Visa in the Federal District Court for the District of Utah, on January 17, 1991. Counts I and II raise claims under Section 1 of the Sherman Act, 15 U.S.C. § 1; Counts III and IV raise claims under the Utah Antitrust Act, Utah Code Ann. §§ 76-10-911 to -926; and Count V raises a claim under the Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1 to -18. Included in Sears' prayer for relief was a request for a permanent injunction.

Shortly after the complaint was filed, Sears moved for a preliminary injunction seeking to compel Visa to allow the launch of the Prime Option Visa card program. Sears' motion was granted by the court. 763 F. Supp. 1094 (D. Utah 1991). The court found that MountainWest Savings' Visa membership had never been

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[6] Sears attempted to gain entry into Visa without clearly disclosing to Visa its affiliation with MountainWest Financial. Aware of Bylaw 2.06, MountainWest Financial failed to reveal to Visa its affiliation with Sears and the Discover Card. Visa discovered that MountainWest Financial was actually owned by Sears only after conducting its own investigation. Visa has pending against Sears a counterclaim for fraud.

terminated, and that Sears was "entitled to enjoy all of the rights and privileges of membership, including the right to launch the 'Prime Option' program." *Id.* at 1098-99. The court further found that issuance of the preliminary injunction would not alter the status quo and that the other requirements necessary for a preliminary injunction had been met. *Id.* at 1100.

Visa appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit. On June 18, 1991, the Tenth Circuit reversed the holding of the district court, finding that the preliminary injunction would in fact alter the status quo and that Sears, under such circumstances, had not met the heavy burden required for a preliminary injunction. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1102 (10th Cir. 1991). The case was remanded to the district court for further proceedings.

On March 25, 1991, Visa filed an Answer to the Complaint which included a Counterclaim against Sears. Count I of the Counterclaim raises a claim of Trademark Infringement under the Lanham Act, 15 U.S.C. § 1114; Count II alleges a violation of Section 7 of the Clayton Act, 15 U. S.C. § 18; Count III alleges fraud; Count IV raises a claim for unfair trade practices under California law; and Count V raises, in the alternative, a claim for breach of contract.

The parties then resumed discovery in preparation for trial. Another twist was added to this litigation, however, when on December 19, 1991, President Bush signed into law a statute dealing with RTC-transferred institutions. The statute amended the Home Owners' Loan Act, 12 U.S.C. § 1441a, by adding a new subsection, (q), as follows:

> *Continuation of obligation to provide services*
>
> No person obligated to provide services to an insured depository institution at the time the Resolution Trust Corporation is appointed conservator or receiver for the institution shall fail to provide those services to any person to whom the right to receive those services was transferred by the Resolution Trust Corporation after August 9, 1989, unless the refusal is based on the transferee's failure to

> comply with any material term or condition of the original obligation. This subsection does not limit any authority of the Resolution Trust Corporation as conservator or receiver under section 11(e) of the Federal Deposit Insurance Act.

Federal Deposit Insurance Corporation Improvement Act of 1991 § 471, Pub. L. No. 102-242, 105 Stat. 2385 ("Section 471"). Pursuant to this section, persons under contract to provide services to a federal deposit institution prior to its takeover by the RTC are required to continue to provide those services after transfer by the RTC to a new owner–so long as the new owner complies with all of the terms and conditions of the original contract.

In response to the enactment of this statute, Sears amended its Complaint, alleging that Visa's refusal to issue the credit cards sought by Sears constituted a violation of Section 471. Sears moved for summary judgment on that basis. On February 18, 1992, the court denied the motion, finding that Bylaw 2.06's prohibition of affiliation with Sears was a material condition of the original agreement between Visa and MountainWest Savings. 784 F. Supp. 822, 834 (D. Utah 1992). Because MountainWest Savings was bound by the bylaw, the restriction was also effective as to MountainWest Financial, pursuant to the terms of Section 471. *Id.*

On July 30, 1992, the court heard oral argument on various additional motions filed by the parties. These motions included: 1) Visa's Motion for Summary Judgment on Sears' Sherman Act Claim; 2) Sears' Motion for Summary Judgment on Visa's Clayton Act Counterclaim; 3) Sears' Motion for Summary Judgment on Visa's Non-antitrust Counterclaims; and 4) Sears' Motion to Bifurcate the trials of the antitrust and non-antitrust claims. The court denied all motions for summary judgment, finding genuine issues of material fact which required a determination by the trier-of-fact at trial. The court, however, granted Sears' motion to bifurcate the trial. 801 F. Supp. 517, 528-29 (D. Utah 1992). The initial trial would concern only the liability aspects of the antitrust claims. The damages portion of the antitrust claims, as well as all non-antitrust claims, would be tried at a later date, if necessary. *Id.*

Trial began on October 13, 1992. Sears' Sherman Act claim was presented to an eleven-person jury,[7] while, at the same time, Visa's Clayton Act claim was tried to the court. With respect to Sears' Sherman Act claim, the dispute focused on whether the restraint of trade imposed by Bylaw 2.06 is "unreasonable." Sears asserted that the restraint is unreasonable because it substantially harms competition in the relevant market.

For purposes of this lawsuit, it was agreed by both parties that the relevant market is the general purpose charge card market in the United States. At the time of trial, the issuers of general purpose charge cards in the United States were the Visa and MasterCard associations, American Express, Citibank (Diners Club and Carte Blanche), and Sears (the Discover Card). Visa was estimated to possess 45.6% of the nationwide general purpose charge card market; MasterCard, 26.4%;[8] American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%. Competition among these five brands is known as interbrand or "intersystem" competition. Competition among association members, such as Visa members, is known as intrabrand or "intrasystem" competition.

Sears argued at trial that Bylaw 2.06 hinders competition by excluding Sears' planned Prime Option Visa card from being offered in the market. Sears asserted that the Prime Option Visa card would be a low-cost, highly competitive addition to the Visa system. Bylaw 2.06, it was argued, harms consumers because it prevents them from

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[7] A 12-person jury was initially selected. One of the jurors, however, failed to appear on the first day of trial following jury selection and before the presentation of opening statements. The court proceeded with 11 jurors, with the agreement of counsel for both parties, and in accordance with Rule 48 of the Federal Rules of Civil Procedure.

[8] Evidence at trial showed that in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately $42.5 billion in charge volume in 1991—representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market.

gaining access to the card, thereby hindering intrasystem competition within the Visa system. At the time of trial, this exclusion only applied to two entities–Sears and American Express. In the estimation of Visa's Board of Directors, no other entity was issuing a "competitive" card in the relevant market.

Sears also asserted that Bylaw 2.06 harms competition by discouraging the creation and development of other proprietary cards. Bylaw 2.06, it was argued, punishes those who may seek to offer a successful, competitive proprietary card, such as the Discover Card. Because of the bylaw, non-Visa members who develop a successful proprietary card would be prohibited from joining the Visa system and current Visa members would be expelled from the system if they developed such a card.

In response to Sears' arguments, Visa asserted that Bylaw 2.06 is not unreasonable. Visa maintained that the bylaw is beneficial, rather than harmful, to competition. It asserted that the exclusion of Sears from the Visa association preserves intersystem competition because Discover Card is one of the few successful intersystem competitors with Visa in the relevant market. Allowing Sears to join the Visa system would arguably weaken intersystem competition between Visa and Discover. Thus, Visa submitted, Bylaw 2.06 actually enhances competition in the relevant market. Furthermore, Visa argued that any harmful effects of Sears' exclusion are insubstantial. Because Visa does not set restrictions on the price or output of Visa cards issued by its member banks, it was argued that the present intrasystem competition is vigorous and the exclusion of Sears cannot possibly have a substantial, negative impact on competition in the relevant market.

Following a three and one-half week trial, and two days of deliberation, the jury returned a verdict pursuant to special interrogatories, as follows:

> **QUESTION NO. 1:** Has Sears proved, by a preponderance of the evidence, that Visa's Bylaw 2.06 has a substantially harmful effect on competition in the relevant market?
>
> Yes X. No ___.

QUESTION NO. 2: Has Sears proved, by a preponderance of the evidence, that the harmful effect substantially outweighs any beneficial effect on competition in the relevant market?

Yes X. No ___.

QUESTION NO. 3: Has Sears proved, by a preponderance of the evidence, that it was injured by Visa's Bylaw 2.06?

Yes X. No ___.

Following trial, the parties filed the post-trial motions presently pending before the court. After hearing oral argument, the court took the motions under advisement. The court now rules on Visa's Rule 50(b) Motion for Judgment as a Matter of Law on Sears' Sherman Act claim, Visa's Rule 50(b) Motion for Judgment as a Matter of Law on its Clayton Act Counterclaim, and alternatively, Visa's Rule 59 Motion for a New Trial.

DISCUSSION

I. VISA'S RULE 50(b) MOTION–THE SHERMAN ACT

Visa argues that Sears' Sherman Act claim must fail as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. Visa raises two general arguments. First, Visa argues that Sears' claim is legally insufficient and should never have gone to the jury. This argument is based on general economic principles, including notions of private property and the preservation of efficiency-enhancing joint ventures. Next, Visa argues that the facts of this case are so lacking that no reasonable jury could have ruled in Sears' favor. For organizational purposes, the court will refer to the former as Visa's "legal argument" and to the latter as Visa's "factual argument," recognizing, of course, the essentially legal nature of each argument under Rule 50(b), as well as the considerable overlap of the factors that pertain to both arguments.

A. Visa's "Legal Argument"

Visa's legal argument has been presented several times to the court.[9] The argument has evolved and changed somewhat over time, having been articulated slightly differently each time it has been presented. In each instance, however, the central theme of Visa's legal argument has remained the same: that under the circumstances of this case, the restraint imposed by Bylaw 2.06 cannot violate the antitrust laws. Visa contends that when a joint venture such as Visa does nothing more than refuse to share its property with a successful competitor such as Sears, there can be no violation of Section 1 of the Sherman Act.

1. Legal Structure of the Sherman Act

Before addressing the details of Visa's legal argument, it is helpful to examine Section 1 of the Sherman Act and the legal requirements necessary to establish a violation of that section. Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

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[9] Visa first raised the argument in support of its Motion for Summary Judgment. The court denied the motion in a written opinion. *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 801 F. Supp. 517, 523 (D. Utah 1992). Thereafter, the issue was raised again in connection with Visa's Motion for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b), which the court denied. The argument was again presented at the close of Sears' case at trial as Visa's Motion for Judgment as a Matter of Law under Rule 50(a) of the Federal Rules of Civil Procedure. Finally, Visa raises the issue in support of this Rule 50(b) Motion for Judgment as a Matter of Law.

15 U.S.C.A. § 1 (Supp. 1992).[10] The plain language of the section appears to prohibit *all* restraints of trade. However, courts determined early on that the section was not intended to be applied so broadly, finding that "restraint is the very essence of every contract," and "read literally, § 1 would outlaw the entire body of private contract law." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978); *see also Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918). As a result, it has been clearly established that a restraint of trade does not violate Section 1 unless it is found to be "unreasonable." A restraint of trade is unreasonable if it substantially harms competition in the relevant market to the extent that the harmful effects substantially outweigh any beneficial effects. This process of determining whether a restraint is unreasonable is known as the "Rule of Reason." *See Standard Oil Co. v. United States*, 221 U.S. 1, 67, 31 S.Ct. 502, 518, 55 L.Ed. 619 (1911); *Board of Trade*, 246 U.S. at 238-39, 38 S.Ct. at 243-44; *Professional Engineers*, 435 U.S. at 687-88, 98 S.Ct. at 1363; *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 960 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990).

a. The Rule of Reason

"[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Professional Engineers*, 435 U.S. at 691, 98 S.Ct. at 1365. This determination is generally made by the trier-of-fact. "[T]he factfinder weighs all of the circumstances of a case in

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[10] Sears' claim is actually one for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Although Section 1 of the Sherman Act provides for criminal penalties, Section 4 of the Clayton Act allows for private enforcement of the antitrust laws by private parties. Section 4 provides in relevant part:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . 15 U.S.C.A. § 15 (Supp. 1992).

deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 691 n.17, 98 S.Ct. at 1365 n.17. The fact-finder must examine "a variety of actual market factors" in making this determination. *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1298 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073, 110 S.Ct. 1119, 107 L.Ed.2d 1026 (1990). This includes an analysis of the restraint imposed–the nature and history of the restraint, and whether the restraint affects price, output, or product quality. The fact-finder may also examine the relevant market–the structure of the market, the parties' positions in the market, and the nature of the market before and after the restraint was imposed. *Board of Trade*, 246 U.S. at 238-39, 38 S.Ct. at 243-44. Furthermore, a Rule of Reason analysis may include an examination of the party's purpose in imposing the restraint.

Visa correctly observes that not all Section 1 cases must be submitted to a jury. A complete Rule of Reason inquiry often requires a protracted and complicated examination of the relevant facts. As a result, courts have developed presumptions, or "screens," as Visa calls them in its briefs, to filter out those cases which do not require full Rule of Reason analysis by the fact-finder at trial, but rather, may be decided as a matter of law.

b. Per Se Illegality

The first presumption developed by the courts is the rule of *per se* illegality. "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103-04, 104 S.Ct 2948, 2961, 82 L.Ed.2d 70 (1984). Certain activities are so facially pernicious that they are declared presumptively unreasonable by the court. Agreements and practices which are "plainly anticompetitive," *Professional Engineers*, 435 U.S. at 692, 98 S.Ct. at 1365, and which are lacking in "any redeeming virtue," *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), are presumed to be illegal without conducting a detailed Rule of Reason analysis. Price fixing and bid rigging are examples of these types of activities.

The United States Supreme Court has explained the benefits of the *per se* analysis approach:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable–an inquiry so often wholly fruitless when undertaken.

Northern Pacific, 356 U.S. at 5, 78 S.Ct. at 518.

Courts, however, are hesitant to find alleged restraints of trade illegal *per se*. The anticompetitive effect must be relatively certain. *See United States v. Topco Assocs.*, 405 U.S. 596, 607-08, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."). Even when the *per se* presumption appears to be proper, the presumption will not be applied if the restraint could possibly have legitimate, beneficial effects or if the restraint is such that it is necessary for the product to exist at all.[11]

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[11] Joint ventures often fall into this category. *See North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982) ("Because agreements between members of a joint venture can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under the rules of reason."); *NCAA*, 468 U.S. at 100-01, 104 S.Ct. at 2960 (*Per se* analysis inappropriate in an industry in which "horizontal restraints on competition are essential if the product is to be available at all."); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.") Furthermore, the *per se* presumption will not be used against a joint venture if the defendant lacks market power or exclusive access to an essential facility. *See Northwest Wholesale Stationers, Inc. v.*

Regardless whether a restraint is subjected to a full Rule of Reason analysis or a presumption, the "essential inquiry" is the same—whether the restraint substantially harms competition in the relevant market. *NCAA*, 468 U.S. at 104, 104 S.Ct. at 2961. "[T]here is often no bright line separating *per se* from Rule of Reason analysis." *Id.* at 104 n.26, 104 S.Ct. at 2962 n.26.

c. Legal "Screens" for Nonviolations

At the opposite end of the spectrum from *per se* illegality, courts will sometimes find a restraint "reasonable," or perhaps more accurately, "not unreasonable" as a matter of law. This occurs when no reasonable fact-finder could find the restraint to be unreasonable, and therefore submitting it to the jury for a complete Rule of Reason analysis would not be of value. Based on current precedent, there appear to be two general types of cases in this category.

The first situation arises when it can be shown that the defendant does not possess market power. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38, 104 S.Ct. at 2964 n.38. The plaintiff bears the burden of proving that the defendant possessed and exercised market power.[12] "To demonstrate 'market power,' a plaintiff may show evidence of *either* 'power to control prices' *or* 'the power to exclude competition.'" *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225-26 n.3 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988) (emphasis in original). A restraint is not unreasonable under the antitrust laws unless it substantially harms competition. When a defendant lacks market power, it lacks the ability to substantially harm competition. Consequently, when the evidence clearly demonstrates an absence of market power, no reasonable jury could

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Pacific Stationery & Printing Co., 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985).

[12] In some circumstances, not applicable to this case, detailed evidence of market power may be unnecessary. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460, 106 S.Ct. 2009, 2018, 90 L.Ed.2d 445 (1986); *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 968 n.24 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990).

find the restraint to be unreasonable. Under such circumstances, a court may declare the restraint not unreasonable as a matter of law and dismiss the claim without submitting it to a jury. *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 791 F. Supp. 956, 966-67 (N.D.N.Y. 1992); *see Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482 (3d Cir.), *cert. denied*, __U.S.__, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992); *Rebel Oil Co. v. Atlantic Richfield Co.*, 808 F. Supp. 1464, 1466 (D. Nev. 1992).

The second type of circumstance in which a restraint was found to be "not unreasonable" as a matter of law was recognized in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597, 106 S.Ct. 1348, 1361, 89 L.Ed.2d 538 (1986). There, the Court found that when a plaintiff's theory of violation does not "make economic sense," dismissal is appropriate. *See also Eastman Kodak Co. v. Image Technical Servs.*, __U.S.__, __, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992).

The central focus of Visa's legal argument is that the court should apply a shorthand presumption or screen to dismiss Sears' claim without submitting it to a jury. Visa argues that such a dismissal is warranted under the market power and economic sense screens. In addition, Visa proposes that the court adopt a new screen, based upon economic principles, to declare Bylaw 2.06 not unreasonable as a matter of law. The court will now evaluate Visa's position under these three screens.

2. The Market Power Screen

Visa claims the court should find no Sherman Act violation because, as a matter of law, Bylaw 2.06 was not an exercise of market power. Visa submits that because the bylaw does not restrict competition or control the price or output of Visa cards within the Visa system, it cannot be an exercise of market power.

The court finds, however, that the market power screen is not applicable in this case. The market power screen is based on the *existence* rather than the *exercise* of market power. If the relevant facts clearly demonstrate an absence of market power, the court may dismiss the case. If the court determines, however, that there is sufficient evidence from which a reasonable fact-finder could find the

existence of market power, the case must be submitted to the jury. The jury then determines factually whether the defendant possessed market power, and, if so, whether the defendant exercised market power to unreasonably restrain trade.

At trial, Sears presented sufficient evidence of Visa's market power to allow this case to proceed to the jury. The evidence showed that Visa members control 45.6% of the relevant market through the Visa system. This fact alone suggests the existence of market power. The evidence also showed that Visa members, through their membership in the MasterCard association, control an additional 24.6% of the market—for a total of 72%.[13] Sears' expert witness, Professor James Kearl, testified that this position in the relevant market gives Visa members the ability to collectively exercise market power. Accordingly, the court finds there was sufficient evidence of Visa's market power to support a submission to the jury regarding the possession and exercise of that power.

3. The Economic Sense Screen

Visa next argues that Sears' theory of a Sherman Act violation makes no economic sense. This argument is based on the United States Supreme Court's rulings in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and *Eastman Kodak Co. v. Image Technical Services, Inc.*, __U.S.__, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992), in which the Court recognized that a case may be dismissed when the plaintiff's theory regarding the defendant's alleged restraint of trade makes no economic sense. Under this theory, Visa claims, the court should apply a similar "screen" to find that Bylaw 2.06 is not unreasonable as a matter of law.

Visa bases this argument on the inherent economic benefits of a joint venture, and the claim that a joint venture's exercise of its property rights cannot substantially harm competition. Specifically, Visa emphasizes that Bylaw 2.06 does not restrict competition as to

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[13] In 1991, for example, the top five Visa/MasterCard issuers controlled 36.7% of the total charge volume for the two associations. (Pl.'s Ex. 752). Those five issuers were Citicorp, First Chicago, AT&T Universal, Chase Manhattan, and MBNA America.

price or output. Competition among the 6000 members is said to be vigorous, and therefore the exclusion of one additional competitor cannot harm competition. Visa argues that any challenge to such conduct is economically unsound.

Visa's reliance on the concept of no economic sense used in *Matsushita* and recognized in *Eastman Kodak* is misplaced in the present case. In both *Matsushita* and *Eastman Kodak*, the focus of the economic sense inquiry centered on whether the alleged restraint of trade was economically detrimental to the defendant. If the alleged restraint were significantly detrimental, the plaintiff's argument could be said to make no economic sense and dismissal could be appropriate.

For example, in *Matsushita*, American television manufacturers alleged that Japanese manufacturers, over a twenty-year period, had illegally conspired to drive American firms from the market. 475 U.S. at 577, 106 S.Ct. at 1351. This conspiracy allegedly focused on a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [the defendants] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." *Id.* at 578, 106 S.Ct. at 1351 (emphasis in original). The Court found that a conspiracy to depress prices in the American market to drive out American competitors was implausible because it required the conspirators to incur substantial losses to recover uncertain gains. *Id.* at 590, 106 S.Ct. at 1357. As such, the Court found the allegation made no economic sense because "as presumably rational businesses, [defendants] had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for [defendants] with no corresponding gains." *Id.* at 595, 106 S.Ct. at 1360. The Court concluded that if the defendants had "no rational economic motive to conspire, and if their conduct [was] consistent with other, equally plausible explanations, the conduct [would] not give rise to an

inference of conspiracy," and summary judgment was appropriate.[14] *Id.* at 596-97, 106 S.Ct. at 1361.

Using the *Matsushita* case as a foundation, the concept of "no economic sense" was also used as a defense in *Eastman Kodak*. There, defendant Eastman Kodak, a manufacturer of photocopiers and related equipment, instituted a policy of selling parts only to those who had purchased Kodak equipment, and those who used Kodak service or did their own repairs. __U.S. at __, 112 S.Ct. at 2076-77. After several independent service companies were forced out of business, a group brought suit alleging that Kodak "had unlawfully tied the sale of service for Kodak machines to the sale of parts." *Id.*, __U.S. at __, 112 S.Ct. at 2078. In response, Kodak argued that it made no economic sense for Kodak to raise "its parts or service prices above competitive levels" because potential customers would simply stop buying Kodak equipment. *Id.*, __ U.S. at __, 112 S.Ct. at 2084.

On this basis, Kodak argued that the Court, as a matter of law, should accept a "basic economic reality" that competition in the equipment market would prevent market power in the parts and service areas. *Id.* The Court rejected this argument, finding that it was possible for Kodak to lose equipment sales and still not suffer economic detriment. *Id.*, __U.S. at __, 112 S.Ct. at 2084-88. "The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales." *Id.*, __U.S. at __, 112 S.Ct. at 2084. As a result, the Court concluded that the plaintiff's argument made sufficient "economic sense" to avoid dismissal. *Id.*, __U.S. at __, 112 S.Ct. at 2088.

In the instant case, Visa argues, in effect, that Sears' antitrust allegation against Visa makes no economic sense. However, unlike the defendants in *Matsushita* and *Eastman Kodak*, Visa does not base

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[14] The case was remanded to the United States Court of Appeals for the Third Circuit which was then "free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that [defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so." *Matsushita*, 475 U.S. at 597, 106 S.Ct. at 1362.

this argument on any claim that Bylaw 2.06, as interpreted by Sears, is economically detrimental to Visa members. Rather, Visa claims that Sears' argument should be dismissed as a matter of law because joint ventures have inherent economic benefits. The court finds that Visa's argument is not consistent with the economic sense screen described by the Supreme Court.

Even if Visa's argument of no economic sense were based on claims of economic detriment to Visa, there was sufficient evidence presented by Sears to rebut the claim and warrant a submission of the issue to the jury. Sears alleged that Bylaw 2.06 was designed to economically benefit Visa members by excluding Prime Option Visa, a potentially large-scale, low-cost competitor in the general purpose charge card market. This exclusion, Sears argued, restricts competition within the Visa system, thereby allowing current members to keep prices artificially high.

In evaluating Sears' theory of anticompetitive effects, the court does not find Sears' claims to be economically implausible or senseless. Despite the fact that competition within the Visa system is said to be vigorous, there is evidence to support a reasonable jury finding that Bylaw 2.06's exclusion of Sears from the Visa system harms competition.[15]

4. Visa's Proposed Screen

Regardless of, and in addition to, the applicability of the two previously-mentioned screens of market power and economic sense, Visa argues the court should recognize a new "screen" applicable to the facts here.

Visa's argument rests upon two general economic principles. First, Visa stresses the importance of protecting private property in a capitalistic market. It asserts that a party should not be required to deal with its competitor or share its property absent unusual circumstances. Imposing a duty to deal, it is argued, harms consumers by destroying incentives and innovation. Second, Visa argues that efficiency-enhancing joint ventures such as the Visa association should be entitled to special treatment under Section 1 of the Sherman Act. Such joint ventures, Visa argues, are beneficial to

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[15] *See* Part I.B.2. of this Opinion, *infra*.

competition and consumers. The threat of antitrust litigation, however, discourages the creation of such ventures. Accordingly, Visa contends, they should be entitled to special treatment.[16]

These two economic principles, Visa argues, are so compelling that they warrant special protection from antitrust scrutiny. Specifically, Visa asserts that when a joint venture refuses to deal with a competitor, it should not be subject to Section 1's Rule of Reason examination unless the excluded competitor meets a heightened standard–showing that it is unable to compete without the withheld property. When a competitor is able to compete successfully on its own, it is argued, there can be no antitrust violation from refusing to deal with that competitor. Visa would require that the excluded competitor show that it is unable to compete without access to the joint venture's property. In other words, the property must be an "essential facility" necessary for the success of the excluded competitor.

A competitor challenging its exclusion from a joint venture, Visa argues, is not entitled to a Rule of Reason trial—absent a showing of essential facilities. When such a showing is not made, the court should dismiss the challenge without submitting it to a jury. Based on this analysis, Visa seeks "a 'screen' based on economic learning which justifies a legal rule limiting the circumstances in which a duty to deal will be imposed by the antitrust laws[.]" *Visa's Nov. 24, 1992, Memorandum in Support of Motion for Judgment under Rule 50(b)*, at 12. Visa would have the court employ such a screen to declare Bylaw 2.06 "not unreasonable" as a matter of law.[17]

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[16] These principles are also important to Visa's factual argument. Based upon the same economic principles, Visa argues that no reasonable jury could find Visa's conduct to have a substantially harmful effect upon competition.

[17] It is not entirely clear the extent to which this is a proposal for a new screen or the extent to which it is based on the two previously-mentioned screens of market power and economic sense. In any event, the court recognizes, and Visa concedes, that there is no direct precedent for Visa's argument either in the case law or from the language of the Sherman Act itself.

The court will now analyze Visa's economic principles to determine whether, under the antitrust laws, they are sufficient to impose a heightened burden on the plaintiff. The court will then examine Visa's proposed essential facilities standard, to determine when, if ever, such a showing is required as a matter of law.

a. Private Property: The Right to Refuse to Deal

Visa's first economic principle is based on the premise that the right to deal, or to refuse to deal, with whomever one pleases is subject to special protection from antitrust scrutiny. Visa argues that Bylaw 2.06 is nothing more than a refusal to share its property. The bylaw is merely an agreement among Visa members to exercise their right to refuse to deal with a non-member competitor. This type of agreement, it is argued, does not raise traditional Section 1 concerns and should not be subject to complete Section 1 scrutiny.

Visa submits that there is an important distinction between the types of agreements made among the members of a joint venture. On the one hand, there are those agreements which restrict competition *by and among members* of the joint venture. Such agreements place limits on competition within the system and may result in serious restraints of trade. These types of agreements include price fixing, output limitations, and geographic restrictions. On the other hand, there are those agreements which preserve competition between and among members of the joint venture. For example, when members of a joint venture act as a single unit to refuse to deal with a non-member competitor, Visa argues, intrasystem competition is not adversely affected.

Visa asserts that the difference between these types of agreements is crucial. A limit on intrasystem competition is likely to result in a serious restraint of trade, whereas a refusal to deal will not have the same effect. Visa argues that the former is properly suspect under the antitrust laws, while the latter does not raise the same concerns.

Visa stresses that because of the fundamental difference between the two types of agreements, it would be inappropriate to subject them to the same antitrust standard. An agreement to limit competition among venture members, Visa argues, is properly subject

to full Rule of Reason scrutiny, while a refusal to deal with a non-member competitor is not. Such a refusal, it is argued, should not be limited by Section 1.

Visa contends that the right to refuse to deal with a competitor is important because it protects private property. Protection of that right from strict antitrust scrutiny is essential to the preservation of incentives in the market. Forcing entities to share their property with competitors, it is argued, is harmful to competition in the long run. If firms know they may be forced to share new products and innovations with their competitors, they will be less likely to undertake the effort and the risk required for the development of new products. Rather, the incentive would be to wait for competitors to create new products, and then enter the market by usurping the competitors' innovations. Compulsory sharing of private property discourages innovation and the creation of new products. Because imposing a duty to deal would "negate incentives in our capitalist society," Visa argues that its right to deal with whomever it chooses should be upheld and respected by the antitrust laws. *Visa's Nov. 24, 1992, Mem.*, at 14.

Visa concedes that the right is not absolute. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985), the United States Supreme Court stated: "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." The Court recognized that although there is a general right to deal, or to refuse to deal, with whomever one pleases, that right is restricted by the antitrust laws.

Visa's position, however, is that the right is restricted only in limited circumstances–when the defendant possesses monopoly power, or when the property is an essential facility for competition in the market. Absent these limited and unusual circumstances, Visa argues, the right to refuse to deal should remain unqualified. Neither of these circumstances is applicable to the present case: Visa does not possess monopoly power, and membership in Visa is not an essential facility for Sears' success in the relevant market. Therefore, Visa argues, a duty to deal may not be imposed and Sears' claim should be dismissed.

Visa stresses that *Aspen* is based on Section 2, rather than Section 1, of the Sherman Act.[18] Section 2 requires that a defendant possess and exercise monopoly power in the relevant market. *See Bright v. Moss Ambulance Serv.*, 824 F.2d 819, 823 (10th Cir. 1987) ("The elements of monopolization under Section 2 are 'the possession of monopoly power in the relevant market' and 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966))). Monopoly power is not a requirement under Section 1.

In *Aspen*, a ski resort sued a competitor for violating the monopolization prohibitions of Section 2 of the Sherman Act. 472 U.S. at 595, 105 S.Ct. at 2853. The Court upheld the jury's verdict, finding that the antitrust laws imposed on the defendant a duty to deal with its competitor. *Id.* at 611, 105 S.Ct. at 2861. Visa argues that the duty to deal was imposed only because the defendant possessed monopoly power under Section 2. In a Section 1 case, Visa asserts, a duty to deal will not be imposed absent unusual circumstances equivalent to monopoly power.

Again, Visa argues that imposing a duty to deal is harmful to consumers and competition. It stresses that imposing such a duty will negate incentives for investment, innovation, and product-creation. To protect such incentives, Visa argues, "[a] duty to share or deal must be imposed only under very limited conditions–conditions captured in the notions of essentiality or market power of such a degree that it is tantamount to monopoly or deprivation of an input necessary to effective competition." *Visa's Nov. 24, 1992, Mem.*, at 21.

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[18] Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .

15 U.S.C.A. § 2 (Supp. 1992).

Visa's argument raises legitimate economic policy issues. Visa's legal argument fails, however, because it is not supported by the law–it is contradicted by the language of Section 1 of the Sherman Act and all case law interpreting the Act. The law does not recognize an antitrust exemption for a joint venture's refusal to deal. Such refusals are not insulated from the Rule of Reason examination. All combined activities, whether contracts, conspiracies or combinations, which restrain trade–even simple refusals to deal–are subject to the reasonableness inquiry. Economic concerns cannot change the legal structure of the antitrust laws. Nothing in the Sherman Act itself or in the case law suggests that a refusal to deal by a joint venture such as Visa is limited to Section 2 restrictions, or that such a refusal is entitled to a special protective "screen" from Section 1 scrutiny.

The Supreme Court addressed this issue in the *Aspen* case. The Court did not limit the qualification of the right to deal to Section 2 cases. Rather, the Court noted that the right is also qualified by Section 1, stating that "[u]nder § 1 of the Sherman Act, a business 'generally has a right to deal, or refuse to deal, with whomever it likes, *so long as it does so independently.*'" 472 U.S. at 601 n.27, 105 S.Ct. at 2856 n.27 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984) (emphasis added)). A firm's right to refuse to deal is unqualified only if it does so independently; a firm which acts in concert with other firms is subject to full Section 1 antitrust scrutiny.[19]

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[19] Visa cites *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), as support for its argument. Visa argues: "Applying the standard that properly governs restrictions on competition *by or among members* to a refusal to share property is, in our view, as inappropriate as treating a 'conspiracy' between a parent and its subsidiary as a conspiracy subject to Section 1." *Visa's Oct. 26, 1992, Memorandum in Support of Motion for Judgment Under Rule 50.*, at 10 (emphasis in original).

The court finds no merit in this argument. *Copperweld* offers no support for Visa's position. *Copperweld* stands for the simple proposition that a parent and its subsidiary constitute a single entity for antitrust purposes. 467 U.S. at 777, 104 S.Ct. at 2744. As such, their activities are not governed by Section 1. The Court focused on the distinction between the

Visa's argument concerning the economic benefits of a joint venture's refusal to deal, as opposed to other joint venture restraints, is not entirely irrelevant to the Section 1 inquiry. In some circumstances, the distinction between the two types of restraints may be important. For example, the distinction may be relevant in the court's determination whether to apply the *per se* illegality presumption. An agreement to limit competition by or among members of the joint venture is more likely to harm competition than is a simple refusal to deal with a competitor. Therefore, intrasystem restraints such as price-fixing or output limitations, are usually struck down as illegal *per se*, whereas simple refusals to deal are more likely to be governed by a complete standard Rule of Reason analysis. *See Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 619 (9th Cir. 1979), *cert. denied*, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978).

Visa's argument is also relevant to the fact-finder. Under the Rule of Reason, the jury may consider all evidence of harmful and beneficial effects. Economic arguments concerning the preservation of private property incentives may be, and in this case certainly were, presented to the jury as evidence of beneficial effects.

Thus, both the court and the jury may consider the economic implications of a refusal to deal. This argument, however, does not alter the legal standard. All restraints imposed by joint action, whether simple refusals to deal or restrictions on competition among the members, are governed by Section 1's Rule of Reason analysis. What Visa gains from its legal argument is an escape from a finding that Bylaw 2.06 is *per se* illegal, not the opposite result of some form of *per se* non-illegality.

This notion is illustrated in several cases. For example, in *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89

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independent activities of a single entity and the concerted conduct of multiple entities. It found no "joint activity" and therefore Section 1 was not applicable. *Id.* The holding of the case has no application whatsoever to the issue in this case regarding the application of Section 1 to joint venture activity, regardless of the fact that there are different types of agreements among joint venture members.

L.Ed.2d 2013 (1945), the Supreme Court struck down a joint venture's refusal to deal as a violation of Section 1 of the Sherman Act based on a Rule of Reason analysis. There, the Court was called upon to consider whether certain bylaws of the Associated Press, a joint venture, constituted an unreasonable restraint of trade. The bylaws "granted AP members powers to impose restrictive conditions upon admission to membership of non-member competitors." 326 U.S. at 6, 65 S.Ct. at 1418. Thus, similar to the present case, the bylaws allowed members to refuse membership to existing competitors. The restriction constituted a refusal to share property with a competitor. The Court determined that the restraint was unreasonable under Section 1.

The Court rejected the defendant's plea for special treatment based on notions of private property. It stated:

> It has been argued that the restrictive By-Laws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."; . . . The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible–the collective power of an unlawful combination. That the object of sale is the creation or product of a man's ingenuity does not alter this principle.

Associated Press, 326 U.S. at 14-15, 65 S.Ct. at 1422 (emphasis in original) (citation omitted). The Court did not apply a special "screen" to the refusal to deal, nor did it require a heightened showing of monopoly power or the existence of "essential facilities."[20] Rather, the Court used the Rule of Reason to find the restraint unreasonable.

This case makes it clear that notions of private property and protection of incentives to create are not entitled to special protection from the antitrust laws. Although such notions are important policy considerations and may be important to the factual Rule of Reason inquiry, they may not be used to avoid antitrust scrutiny.

Reazin v. Blue Cross & Blue Shield, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), is also instructive on this issue. There, an insurance company, Blue Cross, conspired with two hospitals to injure a third hospital which was affiliated with a competitor. Blue Cross terminated its contract with the third hospital and structured its contract with the other two so as to increase the costs of the third hospital. *Id.* at 954-55. The agreement was challenged as an unreasonable restraint of trade under Section 1. The restraint was submitted to a jury for determination under the Rule of Reason. The jury found a violation of Section 1. *Id.* at 955. On appeal, the Tenth Circuit upheld the jury's findings. *Id.* at 972.

The defendant's conduct in *Reazin* is comparable, although not completely analogous, to Visa's conduct in the present case. Like Visa, Blue Cross's conspiracy constituted an exercise of the right to deal and to refuse to deal. No special standards were applied to the restraint despite the fact that the plaintiff hospital was a viable, thriving competitor. The restraint was struck down because it was found to substantially harm competition. Although *Reazin* involved a vertical restraint of trade, the case supports the proposition that a

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[20] *Associated Press* is often referred to as a so-called "essential facilities" case. As discussed in Part I.A.4.c. of this Opinion, *Associated Press* does not involve a facility that was essential to the existence of the non-Associated Press newspapers as rival, on-going concerns. There is no doubt the facility in question–membership in Associated Press–was very important to the plaintiffs, but it was, strictly speaking, not essential.

restraint imposed by a simple refusal to deal is not subject to special treatment, but rather is to be judged by the same standard as all other Section 1 restraints.[21]

Visa's legal argument must fail for another reason as well–it is not applicable to the facts of this case. Even if the court were to grant special legal deference to a simple refusal to deal, Bylaw 2.06 would not qualify for such special treatment. The court finds, contrary to Visa's position, that Bylaw 2.06 is more than a simple refusal to deal. Rather, as Sears argues, Bylaw 2.06 may also be a restriction on intersystem competition in the general purpose charge card market because it prohibits current Visa members from developing their own proprietary cards.[22]

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[21] At the December 22, 1992, motion hearing, Visa pointed out that *Reazin* was distinguishable from the instant case, noting that the two would be analogous if Visa had conspired with merchants to deal only with Visa members and not with Discover. The court agrees that *Reazin's* value here is limited to showing that a Rule of Reason analysis is appropriate in Section 1 refusal to deal cases.

[22] Visa argues that Sears lacks standing to make this argument. Because Sears has apparently suffered no injury from the disincentive aspects of Bylaw 2.06, Visa argues that Sears is prohibited from raising this argument to the court or jury. The issue of Sears' standing and injury is discussed in Part I.C. of this Opinion. Sears properly argued the disincentive aspects of Bylaw 2.06 to the court and the jury. Although standing is required to challenge a given restraint, it is not necessary to have standing as to each alleged harmful effect of the restraint. Sears has standing to bring this action because of its exclusion from the Visa system. A party with proper standing may present evidence as to all anticompetitive effects of the challenged restraint, whether or not it has suffered direct antitrust injury flowing from each effect. The question is actually one of admissibility of the evidence, not one of standing. The court found the disincentive evidence to be clearly relevant to the harmful effects issue. The court further found that its probative value was not outweighed by unfair prejudice or any of the other factors set forth in Rule 403 of the Federal Rules of Evidence.

It is undisputed that Visa intended the restrictions of Bylaw 2.06 to apply to current Visa members as well as non-members.[23] Because of the bylaw, current Visa members who develop successful, competitive proprietary cards are subject to expulsion from the Visa system. Sears argues that this imposes a substantial disincentive for Visa members to develop competing proprietary cards. As such, Visa is not simply refusing to share its property with competitors, it is limiting the way in which its own members may compete within the general purpose charge card market. Such a restriction might be likened to a scheme to fix prices, or to limit output to geographical areas. It is an agreement by multiple entities to limit the way in which they compete with each other. It is true that Visa members compete as to price and output of Visa cards within the system. However, Bylaw 2.06 arguably prohibits, or at least substantially hinders, potential intersystem competition by Visa members who may wish to issue their own proprietary cards.

The disincentive aspect of Bylaw 2.06 is somewhat analogous to the restraint discussed in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). There, the National Football League, a joint venture comprised of professional football teams, enacted a rule forbidding its members from obtaining or retaining ownership of any other professional sports team in any other league. *Id.* at 1250. The rule, while allowing for intrasystem competition within the league, restricted the ability of league members to engage in intersystem competition in the relevant market.

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[23] Although such an interpretation of Bylaw 2.06 is not apparent on its face, Visa has made it clear that the bylaw applies to current members as well as new applicants. Furthermore, after the amendment to Bylaw 2.06 was passed, Visa later amended Bylaw 2.10, to directly prohibit all current Visa members from issuing other proprietary, competitive cards. This issue is discussed further in this court's ruling on Sears' Motion for an Order Enforcing its Rights Under Federal Banking Law. 784 F. Supp. 822, 832-34 (D. Utah 1992).

The restraint was struck down as a violation of Section 1, pursuant to the Rule of Reason.[24] *Id.* at 1261.

In conclusion, Visa's arguments concerning private property and the right of refusal to deal must fail for two reasons: A joint venture's private property rights are not subject to special legal treatment under the antitrust laws, and Bylaw 2.06 is not a simple refusal to deal.

b. Joint Ventures Under the Antitrust Laws

The next principle of Visa's legal argument goes to the manner in which joint ventures are treated under the antitrust laws. Visa argues that because of the beneficial aspects of joint ventures, they should be given deferential treatment.

Visa first emphasizes the economic benefits of a joint venture. A "true" joint venture, it is argued, is one in which single firms join together to create products. The combining of efforts gives the joint venture sufficient size and power to accomplish tasks which could not be accomplished by a single firm individually. Thus, it is argued, joint ventures are beneficial to consumers.

Visa also stresses that joint ventures are economically preferable to outright mergers. Members of a joint venture retain their individual identities, and are free to compete between and among themselves. A merger, on the other hand, results in a large, single entity which has no real competition within itself. Thus, a joint

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[24] Such restrictions often trigger *per se* illegality presumptions. However, as discussed in Part I.A.1.b. of this Opinion, the *per se* presumption may not be proper when the restraint has the potential for legitimate, beneficial effects, or if it is necessary for the product to be available at all. *See North American Soccer*, 670 F.2d at 1259.

Thus, although it could be argued that Bylaw 2.06 is subject to the *per se* illegality presumption, the court has found the presumption is not proper in this case. Visa has presented substantial evidence and argument as to the beneficial aspects of Bylaw 2.06. Accordingly, the reasonableness of the bylaw should be determined by the jury under the Rule of Reason.

Sears has apparently conceded this point. It has not argued for a *per se* illegality declaration by the court. Rather, it agrees with the court's decision to submit the claim to the jury.

venture retains many aspects of competition, whereas an outright merger eliminates all intrasystem competition.

Based on this analysis, Visa submits that "the antitrust laws give joint ventures *more*, not less, leeway than independent entities in their conduct." *Visa's Oct. 26, 1992, Memorandum in Support of Motion for Judgment under Rule 50*, at 11 (emphasis in original) (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979)). Visa asserts that holding joint ventures subject to strong antitrust scrutiny is harmful to consumers. Applying a strict standard to joint ventures, it is argued, discourages the incentive to create joint ventures. This disincentive leaves potentially beneficial projects to be undertaken (if undertaken at all) by smaller, less-efficient single firms, or results in outright mergers which eliminate all competition between the merging firms. *See Visa's Nov. 24, 1992 Mem.*, at 19 n.16.

Visa asserts that the Visa joint venture is a true, product-creating joint venture in which "its members have come together to create a new product, through risk and innovation, that none of its members could have created individually." *Id.* at 11. Visa's formation as a joint venture, it is argued, has therefore been beneficial to consumers. As such, the activities of the joint venture should receive greater leeway under the antitrust laws.

Visa's argument on this point raises legitimate policy considerations. It sounds logical and well-reasoned. It suffers, however, from one flaw–it is entirely inconsistent with the law. "The theory that a combination of actors can gain exemption from § 1 of the Sherman Act by acting as a 'joint venture' has repeatedly been rejected by the Supreme Court." *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1257 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). Joint ventures are treated differently from single entities under the antitrust laws based on the very structure of the Sherman Act. "[T]he Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 2744, 81 L.Ed.2d 628 (1984).

Section 1 applies only to "contracts, combinations and conspiracies," or in other words, joint activity. It has no effect whatsoever on a single firm that acts alone. A single firm, acting independently, can restrain trade in any manner without violating Section 1. Unless it runs afoul of the monopoly prohibitions of Section 2, it is immune from antitrust scrutiny.[25]

The distinction between Sections 1 and 2 is important. When firms act in concert, they are subject to scrutiny under both sections. *See Copperweld*, 467 U.S. at 774-75, 104 S.Ct. at 2743. Because joint ventures, by their very nature, engage in combined activity, their conduct is continually subject to antitrust scrutiny under Section 1. The law is not unclear in this regard. The United States Supreme Court explains this issue thoroughly in *Copperweld*:

> Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find the distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such–but only restraints effected by a contract, combination, or conspiracy–it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

467 U.S. at 774-75, 104 S.Ct. at 2743-44 (citation omitted).

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[25] Section 2, of course, applies to all entities, whether acting alone or in concert. No entity, or group of entities, may act to monopolize or attempt to monopolize without violating Section 2. Thus, the Sherman Act makes a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984).

Regardless of Visa's policy arguments, the simple fact of the matter is that joint ventures are subject to Section 1's Rule of Reason. This is the structure of the Sherman Act. The structure may be arbitrary. It may or may not be economically unsound. It is, however, the law.

This is not to say that a joint venture's status as a legitimate, product-creating venture is not relevant to the Rule of Reason analysis. This argument, similar to Visa's private property argument, may be presented to the jury under the Rule of Reason.[26] The nature and purpose of the joint venture is highly relevant to the issues of anticompetitive intent and effect.

The argument is also relevant to the court's determination whether to apply *per se* illegality. As discussed in Part I.A.1.b. of this Opinion, under certain circumstances, activities which otherwise would be declared illegal *per se* may be spared the presumption and submitted to a jury for Rule of Reason inquiry. When the restraint has an arguable legitimate purpose or effect, or if the restraint is such that it is necessary for the product to exist at all, *per se* analysis is improper. Joint ventures often escape the *per se* illegality presumption on these grounds. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985); *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100-01, 104 S.Ct. 2948, 2959-60, 82 L.Ed.2d 70 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d

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[26] Applying this analysis to the present case, Visa's expert witness, Professor Richard Schmalensee, stated at trial:

> [I]t makes no more economic sense to require Visa to share its property with Discover, because it is an association of 6,000 people, than it would make to require Discover to share its property with others simply because it has been selfish in some sense and not shared at all. Neither kind of reasoning makes sense.

(Tr. at 2275). This is a proper economic factual argument, but it does not reinvent the meaning of Section 1. Unless Discover possesses monopoly power, as a single business it is not required to share its property.

1 (1979); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir. 1982).

Thus, the existence of a joint venture may save an otherwise facially pernicious restraint from *per se* illegality, in favor of a jury's factual Rule of Reason analysis. In this limited respect, joint ventures receive greater leeway than single firms which combine and conspire to restrain trade.

This point is illustrated by *Broadcast Music*. There, a joint venture's price-fixing restraint was such that it ordinarily would have been declared illegal *per se*. The court, however, refused to declare the restraint illegal *per se*, but rather, submitted it to "a more discriminating examination under the rule of reason." 441 U.S. at 24, 99 S.Ct. at 1565. The court found the *per se* presumption improper because the restraint imposed by the joint venture was necessary for the product to be available at all. *Id.* at 23, 99 S.Ct. at 1564.

Visa's reliance on *Broadcast Music* as support for its legal argument is misplaced. *Broadcast Music* merely stands for the proposition that joint ventures may escape the *per se* presumption. Contrary to Visa's position, there is no special treatment or "screen" given to efficiency-enhancing joint ventures that would justify dismissing Sears' claim as a matter of law.

c. . "Essential Facilities" as a Legal Requirement

The final aspect of Visa's economic argument is that under the circumstances of this case, a showing of essential facilities is required as a matter of law. Visa asserts that this heightened standard is warranted on the basis of its two economic arguments. When a joint venture does nothing more than to refuse to share its property with a competitor, Visa argues, the excluded competitor has no antitrust claim–absent essential facilities. Accordingly, Visa asserts that for Sears to prevail, it must show that membership in Visa is essential to Sears' existence in the relevant market.

Sears clearly cannot make such a showing. Sears is a successful competitor in the relevant market. It does not need membership in Visa in order to compete in the general purpose charge card market. Through the Discover Card, Sears has shown the ability to compete successfully outside of the Visa system. Visa argues, therefore, that

Visa's exclusion of Sears cannot be an antitrust violation and Sears as a matter of law, cannot prevail on its claim.

It is Visa's claim, however, that fails as a matter of law. There is nothing in the antitrust laws which requires Sears to meet a heightened standard of a showing of essential facilities in order to receive a jury trial. A showing of essential facilities is never required as a matter of law. The standard which applies to Sears is exactly the same standard applied to all plaintiffs in Section 1 cases–the plaintiff must show that the restraint substantially harms competition in the relevant market and that it has suffered antitrust injury therefrom. The plaintiff need not show that the restraint destroys its ability to compete. Rather, it need only show that the restraint harms competition and consumers. Because a restraint may substantially harm competition without eliminating the competitor, a plaintiff may prevail under Section 1 without proving essential facilities.[27]

This is not to say that a showing of essential facilities is not relevant under the Rule of Reason. Although essential facilities is not required as a legal matter, it may be extremely important as a factual matter. Certain restraints may be such that they will not be found unreasonable under the antitrust laws unless a showing of essential facilities is made. When a plaintiff is excluded from a facility which is necessary to compete, it is more likely the exclusion is unreasonable. The more essential the facility, the more likely a duty to share will be imposed. The determination, however, is made by the trier-of-fact under the Rule of Reason.

Visa relies on several cases in support of its essential facilities argument. *United States v. Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), is the leading so-called "essential facilities" case. There, the defendants, by virtue of their control of several bridges over the Mississippi River, controlled every reasonable means of railway access into and out of the city of St. Louis. The United States brought suit under the Sherman Act to compel defendants to share access to the bridges with their

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[27] Of course, the plaintiff must establish that it has suffered antitrust injury from the restraint. This does not require, however, a showing of inability to compete. A showing of negative impact on the ability to compete is sufficient.

competitors. Those excluded from use of the bridges were effectively shut out of the market. Thus, defendants controlled an essential facility for competition in the market. *Id.* at 397, 32 S.Ct. at 510. The Court imposed a duty to share access to the bridges, based upon both Sections 1 and 2 of the Sherman Act. Because railway access was essential for competition, the Court held that the exclusion of competitors constituted a combination in unreasonable restraint of trade. *Id.* at 411-12, 32 S.Ct. at 516.

This holding, however, does not support Visa's position. The case stands for the simple proposition that the existence of essential facilities may result in the imposition of a duty to deal. This does not mean, however, that a showing of essential facilities is required before a duty to deal will be imposed.

Similarly, in *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), newspapers excluded from membership in the Associated Press sought access to the association. The exclusion from membership caused the excluded parties to suffer harm, "hindered and impeded the growth of competing newspapers," and set excluded parties at a "competitive disadvantage." *Id.* at 12, 18, 65 S.Ct. at 1420, 1423. It did not, however, destroy their ability to compete. Many of the excluded newspapers had been and were able to compete in the market without membership in the Associated Press system. Thus, membership was not "essential," and certainly not as important as the bridges at issue in *Terminal Railroad*.

Despite the fact that membership in Associated Press was not "essential," the exclusion was struck down as a violation of Section 1. As in *Terminal Railroad*, the importance of the facility in *Associated Press* was a major, if not the controlling, factor in the fact-finder's determination that the defendants' joint agreement was an unreasonable restraint of trade. Neither case, however, stands for the proposition that without a showing of essential facilities, a plaintiff's case must be dismissed as a matter of law.

Many antitrust refusal to deal cases brought under Section 1 are maintained by plaintiffs who are viable competitors in the relevant market. In *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed. 2d 752 (1990), a competing hospital was successful in its Section 1 claim,

even though it had been, and continued to be, a successful competitor in the relevant market. Therefore, a contract with Blue Cross was not an essential facility necessary for the hospital to successfully compete. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985), the plaintiff was a viable competitor and no essential facilities were established, yet its Section 1 suit was allowed to proceed. *See also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455-56, 106 S.Ct. 2009, 2016, 90 L.Ed.2d 445 (1986) (dentists' refusal to cooperate with insurers' request for X-rays did not involve essential facilities but did withhold particular desirable service from customers); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30, 104 S.Ct. 1551, 1567, 80 L.Ed.2d 2 (1984) (anesthesiologist bringing Section 1 action a viable competitor); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332-33 (9th Cir.), *cert. denied*, 479 U.S. 851, 107 S.Ct. 180, 93 L.Ed.2d 115 (1986) (veterinarians bringing counterclaim did not possess dominance in the relevant market nor did they control an essential facility).

The case law indicates that a showing of essential facilities is not required for a plaintiff to prevail under Section 1. Visa has failed to show any reason for the imposition of a higher standard for Sears' exclusion. The exclusion, therefore, was properly tried to the jury under the Rule of Reason.

d. Summary and Conclusion of Visa's Economic Legal Argument

In summary, the economic principles upon which Visa relies do not support its argument for judgment as a matter of law. There are no legal principles granting antitrust immunity to a joint venture for its refusal to share its property. Such a refusal is subject to the same standard which governs other combinations in restraint of trade–Section 1's Rule of Reason.

These economic arguments may be highly relevant to the reasonableness inquiry. They may be strong and persuasive evidence of the lack of anticompetitive effects. The jury is free to consider such evidence when weighing the benefits and harms of a given

restraint.[28] If a refusal to deal actually benefits, rather than harms, competition, it will presumably be upheld by the jury's verdict.

Visa submits that such a system is poor economic policy. Imposing joint venture conduct to a jury's Section 1 scrutiny, it is argued, harms consumers and competition. Every action undertaken by a joint venture is potentially subject to a Section 1 challenge. The defense of such a challenge can be very costly–especially when a jury trial is involved. Under the present system, unless a shorthand presumption is used to dismiss the claim, the case must go to trial. An antitrust defendant, even if eventually successful, must expend significant time and resources in defending against the claim.

According to Visa, this threat of antitrust litigation acts as a disincentive to the creation of joint ventures. No matter how beneficial a joint venture may be, firms will be hesitant to combine for fear of exposure to antitrust liability. Unless Visa's legal arguments are adopted and joint ventures such as Visa are shielded from Rule of Reason jury trials, Visa argues, consumers will be deprived of the benefits which otherwise could have been achieved through the pooling of efforts in joint ventures.

The court recognizes that such a system may or may not produce detrimental effects. However, such is the present legal system imposed by the Sherman Act. The determination of policy was made in 1890 by the United States Congress when it enacted the Sherman Act. Congress determined that concerted action in restraint of trade would be subject to antitrust scrutiny. It provided that challenged restraints will be subject to litigation. It made no exceptions for joint ventures, or for refusals to deal.

Visa's arguments would shield potentially anti-competitive behavior from antitrust scrutiny. Such arguments are not properly made to the court. Policy arguments may not be used to contradict or alter the law. As explained by the United States Supreme Court:

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[28] In the present case, Visa presented its economic arguments to the jury in considerable detail. The jury presumably considered all of Visa's arguments when making its determination of the unreasonableness of Bylaw 2.06.

> The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason.

National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978) (footnote and citations omitted). Policy arguments, no matter how persuasive, which seek to shield concerted conduct from antitrust scrutiny are of no practical effect when addressed to the court as the grounds for dismissal as a matter of law.

Visa's policy arguments should be directed to Congress rather than the court. It is not the role of this court to alter the law in order to establish what the court may or may not feel is "proper" economic policy. If the structure of Section 1 is arbitrary, unfair, or harmful to consumers, changes should be made by Congress through exemption, amendment, or repeal. "[W]hen Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation." *Associated Press v. United States*, 326 U.S. 1, 14, 65 S.Ct. 1416, 1421-22, 89 L.Ed. 2013 (1945). It is not the province of the judicial branch to alter the law as established by Congress.[29]

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[29] At trial, Visa's expert witness, Professor Richard Schmalensee, stated he had been involved in drafting a legislative proposal aimed at joint ventures created for the purpose of research and development. (*See* Tr. at 2276-78). This proposal addressed an antitrust exemption to allow separate companies to pool their efforts into research and development joint ventures, thereby obtaining greater efficiencies, without the constant threat of being declared illegal *per se*. This exemption from the antitrust laws was sought from the legislative branch, not the judiciary.

Arguments made to Congress in favor of the exemption were similar to those Visa makes here: every joint research and development effort by two or more firms, no matter how desirable for competition and consumers, was subject to a Section 1 lawsuit and a possible finding of *per se* illegality. Competitors not involved in the joint research and development venture,

In conclusion, Visa's economic arguments were properly made to the jury under the Rule of Reason. They may be properly raised before Congress in considering new legislation. They are not, however, based upon current law, sufficient to support judgment in Visa's favor as a matter of law.

B. Visa's "Factual Argument"

Having rejected Visa's legal argument for judgment as a matter of law, the court now turns to Visa's factual argument. This argument is slightly different in nature from the legal argument, but it is based on essentially the same facts. Visa asserts that the facts of this case are so lacking that no reasonable jury could have returned a verdict in support of Sears' Section 1 claim.

At the outset, the court acknowledges that its view of the evidence differs from the jury's findings. If the court had been the fact-finder under Sears' Sherman Act claim, it would most likely not have concluded that keeping Sears out of the Visa system substantially harms competition in the relevant market. In fact, the court would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out. If it had been the fact-finder, the court would have been inclined to find no net harm to competition from Bylaw 2.06.

The court feels this acknowledgement is helpful and appropriate under the unique circumstances of this case. Visa's Clayton Act counterclaim was tried to the court in equity. Accordingly, the court

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therefore, had every incentive to file such a suit. It was asserted that this threat of litigation and *per se* illegality was hindering American progress, and was one reason America was lagging behind other countries in certain economic respects. The proponents of the proposed bill argued that without the threat of *per se* illegality, more American firms would combine money and talent for joint research and development projects. S. Rep. No. 427, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105.

The result of this effort was passage of the National Cooperative Research Act of 1984. 15 U.S.C.A. § 4301 *et. seq.* (Supp. 1983 to 1991). It took an exemption specifically enacted by Congress to achieve the desired antitrust relief in the research and development area. No court has the power to grant such an antitrust exemption.

was required to conduct a thorough factual review of the relevant market. In that regard, the court as a fact-finder was obligated to determine whether allowing Sears, the owner of the Discover Card, to also be a Visa member may substantially lessen competition in the relevant market within the meaning of Section 7 of the Clayton Act. The court's factual inquiry involved consideration of all the relevant economic and policy issues considered by the jury in connection with Sears' Sherman Act claim. As a result, the court's inquiry on the Clayton Act counterclaim is in significant respects the opposite of the jury's inquiry on the Sherman Act claim. Whereas the jury was asked to determine whether it violated the Sherman Act for Visa to keep Sears out, the court was asked whether it violated the Clayton Act to let Sears in. Accordingly, hereafter in Part II of this Opinion, the court performs its Clayton Act fact-finding role. Its factual conclusions are identical to those it gratuitously expresses here. The one and only reason the court does so at this point is to emphasize and strengthen the court's decision that notwithstanding the factual attitude of the trial judge, Sears' evidence as to the Sherman Act was reasonable, credible and capable of supporting the verdict reached by the jury.

Specifically, as explained more fully in its Clayton Act discussion, the court believes that Bylaw 2.06 fosters intersystem competition in the relevant market. Such competition is important in the general purpose charge card market, with only five active intersystem competitors (Visa, MasterCard, American Express, Discover, and Diners Club/Carte Blanche). Simply adding another high-priced card issuer, as Sears has always been with both the Discover Card and the Sears charge card,[30] to the Visa system will not solve the problem. It may provide short-term intrasystem competitive benefits within the Visa system, but in the long run, in the court's judgment, the damages from such inclusion will outstrip the benefits. Eventually, consumers will be left with one more top-ten Visa issuer charging relatively high interest rates and a

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[30] The evidence showed that as of the time of trial, the Discover Card had never charged less than a 19.8% annual percentage rate, the only general purpose charge card never to have charged a lower rate. The Sears Charge card used at Sears retail stores has historically charged an annual percentage rate of approximately 21%.

Visa/MasterCard system which will dominate the general purpose charge card field to an even greater extent than it does today.

In addition, the court found Visa's policy and economic arguments to be the more compelling. As a factual matter, the court found persuasive Visa's positions regarding the need to protect joint venture innovation, the importance of protecting private property, and the economic and competitive consequences of keeping the owner of the Discover Card out of the Visa system. The court found Visa's expert witness, Professor Richard Schmalensee, more compelling than Sears' expert witness, Professor James Kearl, and was persuaded by Visa's industry expert, Mr. Robert McKinley. Visa's general counsel, Mr. Bennett Katz, provided what the court felt was helpful and persuasive evidence regarding the various business reasons why Visa preferred to keep Sears out of the Visa system.[31] The court does not see the proposed Prime Option Visa card as the low-cost boon to consumers that it is touted to be. In short, the court does not see the facts Sears' way.

The court's factual attitude, however, does not require an overturning of the jury's findings as a matter of law. The fact that the court may have ruled differently than the jury on the Sherman Act does not warrant the granting of Visa's Rule 50(b) Motion for Judgment as a Matter of Law. It would be inappropriate for the court to wrongly "'substitute its judgment for that of the jury.'" *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (quoting *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d

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[31] Regardless of the intent and motivation of Visa's member banks in passing Bylaw 2.06, Mr. Katz, as Visa's chief legal officer, expressed concern about government regulation if Visa were to grow significantly larger. Mr. Katz explained that if Sears were to become a Visa member and as a result the Discover Card became less of a competitive force, the federal government may well impose more intrusive regulations on the Visa association or even require a dissolution or break-up of some kind. It is a credible concern for a business in our free enterprise system to worry about being run by the government, whether through the enactment of legislative controls, executive branch administration, or perhaps worst of all, judicial branch scrutiny and approval of its every move.

1166, 1171 (10th Cir.), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985)).

The standard to be applied by the court under Rule 50(b) is not based upon the court's factual findings. Rather, the standard is whether "there is no legally sufficient evidentiary basis for a reasonable jury to have found for (the non-moving) party with respect to that issue." Fed.R.Civ.P. 50. A judgment as a matter of law is "appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.'" *Prudential Federal*, 763 F.2d at 1171 (quoting *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974)). It is clear from the case law in this circuit that in analyzing a Rule 50(b) motion, the court is "obligated to view 'evidence and inferences most favorably to the nonmoving party'". *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, __U.S.__, 111 S.Ct. 1685, 114 L.Ed.2d 80 (1991) (quoting *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988)). "[T]he court must view the evidence and indulge all inferences in favor of the party opposing the motion and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.'" *Lucas*, 857 F.2d at 1400 (quoting *Prudential Federal*, 763 F.2d at 1171). Judgment as a matter of law is appropriate if the court finds no reasonable evidence to support the verdict or if "the verdict is supported only by sheer speculation and conjecture." *Ware v. Unified Sch. Dist. 492*, 881 F.2d 906, 911 (10th Cir. 1989), *modified*, 902 F.2d 815 (10th Cir. 1990).

1. Market Power

The court has previously determined that the evidence was sufficient to support a finding that Visa members *possess* market power in the relevant market.[32] Pursuant to the court's instructions, the jury determined that Visa members collectively possessed market power and that the enforcement of Bylaw 2.06 constituted an exercise of that market power. Visa argues that the jury erred in this finding. It submits that no reasonable jury could find, from the evidence presented at trial, that Bylaw 2.06 is an exercise of market power.

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[32] *See* Part I.A.2. of this Opinion, *supra*.

Visa argues that Bylaw 2.06 is an action by the Visa members in their individual, rather than collective, capacities. Because the Visa system includes approximately 6000 members, Visa argues, no one single member has the ability to exercise market power. Therefore, Visa submits, it is only through collective action that Visa members would be able to exercise market power. Visa asserts that Bylaw 2.06 is not collective action because it allows Visa members to continue to compete individually between and among themselves as to price and output. Visa explains that unless its "members pass rules limiting price or output among themselves, their ability to exercise market power remains a function of their *individual* market shares . . . ." *Visa's Nov. 24, 1992, Mem.*, at 36 (emphasis in original). In other words, Visa submits that only restraints on trade between and among members of the joint venture may constitute an exercise of collective market power.

Sears argues, on the other hand, that Bylaw 2.06 is a collective exercise of market power. Sears asserts that although the bylaw does not expressly restrict competition as to price or output between and among Visa members, it does so indirectly. By excluding a large, low-cost competitor such as Prime Option from the Visa system, the bylaw shields current Visa members from vigorous competition. Although there is competition among the current members, Sears argues that competition is not as strong as it could be. This situation, Sears argues, allows the large banks to maintain high prices and profits at the expense of the consumer. Therefore, Sears claims, Bylaw 2.06 is a collective effort by Visa members to limit competition within the system.

This assertion was supported by evidence at trial. Sears offered the testimony of its expert witness, Professor Kearl, who testified that the 72% combined market share held by Visa and MasterCard is important in determining that Visa members have market power and are able to exercise that power through association rule-making. Professor Kearl further testified that because the collective rule-making directly affects such a large share of the market, Visa members have significant incentive and ability to keep interest rates and profits high. In addition, he asserted that the presence of proprietary cards such as the Discover Card has not stopped Visa members from exercising their collective rule-making power to the

detriment of consumers. Professor Kearl testified that further evidence of Visa's market power is the fact that Visa members, especially its top-ten issuers, have continuously enjoyed high profits for many years.

Visa claims that Sears' evidence was insufficient and no reasonable jury could have based a verdict on this evidence. First, Visa attacks the qualifications of Professor Kearl, claiming that he lacks the education and experience to be credible as an expert witness in this particular area of economics. The court finds this argument to be untimely and without merit. Visa failed to challenge Professor Kearl's qualifications during the trial. He was allowed to give his opinions without objection by Visa. Visa also subjected him to thorough cross-examination. Once an expert is qualified, especially without objection, it is not the province of this court to judge the witness's credibility or to determine which expert should be believed. "It remains the duty of the jury to evaluate the testimony of expert witnesses, just as all other witnesses, and to reach conclusions as to its worth and weight. Our entire system is anchored to the jurors' determination of credibility of witnesses and the weight to be given their testimony." *Moe v. Avions Marcel Dassault-Brequet Aviation*, 727 F.2d 917, 929-30 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984). With no objection at trial as to Professor Kearl's qualifications as an expert, this court will not now step into the jury's domain and disregard or exclude his testimony.

Visa next attacks the findings and conclusions made by Professor Kearl. Visa asserts that Professor Kearl's testimony regarding collective rule-making and the appropriateness of aggregating the shares of Visa and MasterCard members is incorrect. Visa relies on the testimony of its own expert, Professor Schmalensee, who stated that Bylaw 2.06 is not an exercise of market power by the Visa members.

Under Rule 50(b), the court must determine whether the testimony presented by Professor Kearl and the other evidence presented by Sears was such that a reasonable jury could have relied on it in finding an exercise of market power by Visa. The court concludes that the jury could have so found. It was not unreasonable for the jury to believe Professor Kearl's testimony and to conclude

that in the aggregate, Visa members possessed and exercised market power. His testimony regarding the collective rule-making power of Visa members and the presence of high profits is supported by evidence that the largest members of Visa have been very slow in responding to price competition from smaller Visa members and new entrants. This testimony was supported by Mr. McKinley, Visa's own industry expert, who acknowledged that the large Visa and MasterCard issuers continue to charge high interest rates even though many smaller issuers, such as locally-owned savings and loan associations, have lowered their interest rates significantly. All of this evidence could have persuaded the jury that Visa members possessed and exercised market power in passing Bylaw 2.06.

2. Harmful Effects

Visa attacks the jury's finding that Bylaw 2.06 has substantially harmful effects on competition. Visa claims that based on the evidence presented at trial, no reasonable jury could have so concluded. As explained in the Background section of this Opinion, Sears presented evidence that Bylaw 2.06 harms competition by preventing Sears' low-cost Prime Option Visa card from entering the market, and by creating a disincentive for the creation of new proprietary cards. Visa attacks Sears' disincentive evidence by asserting that it is based merely on speculation. Visa asserts that there is no direct evidence suggesting that Bylaw 2.06 has deterred anyone from offering a new general purpose charge card. The court does not agree.

First, this is a common sense argument. Evidence showed that a Visa membership can be highly profitable. It is reasonable to argue that no firm will enter the general purpose charge card market with a new proprietary card if it risks losing its Visa membership. This common sense conclusion was supported by specific evidence presented at trial. Dean Witter's President, Phillip Purcell, testified that Sears would not have developed its proprietary Discover Card had it known that such a move would disqualify it for membership in Visa. The evidence also showed that no entity has created a new proprietary card since the passage of Bylaw 2.06. In contrast, during the same period, many entities have joined the Visa and MasterCard systems. Finally, Visa's own internally-prepared document lists no

fewer than twenty-one Visa members whom Visa views as potential competitors with the capacity to issue their own proprietary cards. (Pl.'s Ex. 297). Based on this evidence, the court finds that a reasonable jury could have found harmful effects on competition based on Sears' disincentive evidence.

Next, Visa argues that the evidence was insufficient to support a finding that excluding Sears' Prime Option Visa card from the market had a harmful effect on competition. Visa asserts that because competition is vigorous between the 6000 Visa members, the exclusion of one more member in the association is insignificant. Again, the court does not agree that Visa's argument was so compelling that a reasonable argument to the contrary was not possible.

Sears presented evidence that the addition of Prime Option Visa to the Visa system would be substantially beneficial to competition. There was testimony that Prime Option would be a low-cost card[33] which would be supported by powerful marketing and advertising strategies on a national level. While smaller Visa issuers may offer lower interest rates, such firms do not have the marketing muscle of Sears. Furthermore, while most of the top-ten Visa issuers provide lower-cost cards to some of their customers, Prime Option's favorable terms would be available to all of its customers. Based on such evidence, it was not unreasonable for the jury to find that the exclusion of Sears was harmful to competition.

3. Beneficial Effects

Visa has enumerated various beneficial effects it claims Bylaw 2.06 has on competition. This argument is essentially identical to Visa's previous legal argument based on economic principles and policies. First, Visa asserts that Bylaw 2.06 should be upheld because the protection of property rights is essential to encourage innovation and risk-taking in business. Second, Visa argues that the

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[33] At the time of trial, Prime Option Visa's terms anticipated a 25-day grace period for all card holders, a 9.9% rate of interest on the current and the previous month's purchases and a rate of 9.9% plus the Prime Rate on older purchases. In addition, there is no annual fee, a periodic skip-a-payment, and a standard opening credit line of $3500.

protection of incentives for the creation and maintenance of joint venture property is also a reason to uphold Bylaw 2.06. Given these compelling policy considerations, Visa claims no reasonable jury could have concluded that the harmful effects of Bylaw 2.06 substantially outweigh the beneficial effects.

Just as the court rejected Visa's legal argument on this point, it rejects the assertion that Visa's policy arguments are so compelling that no reasonable fact-finder could have found to the contrary. As a factual matter, the jury did not accept Visa's arguments as dispositive. The court does not know whether the jurors simply discredited the evidence presented on these issues or whether they found that the benefits to competition were outweighed by the harmful effects. In either case, however, it was the jury's prerogative to weigh the evidence.

Visa also argues that an additional benefit to competition from Bylaw 2.06 is the preservation of competition at the intersystem level. Visa argues that the intersystem market is already highly concentrated with only five system-level competitors: Visa, MasterCard, Discover, American Express and Diners Club/Carte Blanche. If Sears were to join the Visa system, Visa argues that competition between Discover and Visa will decrease, thereby affecting competition on the intersystem level.

Visa points out that as a result of duality, there is no significant intersystem competition between Visa and MasterCard. Visa argues that this lack of competition is indicative of what will happen to competition between Discover and Visa if Sears is allowed to issue Prime Option. Visa attempted to articulate this point at trial, presenting evidence regarding the effects of duality and the possibility of a similar occurrence if Sears were allowed to become a member of Visa.

Visa also claims that the Discover Card will be less viable as an intersystem competitor for various other reasons. Witnesses explained how they feared Sears would put less time and money into improving Discover, and that Discover's top executives would be reassigned to Prime Option Visa. In addition, testimony was offered to suggest that Sears, as a Visa member, may choose to implement new and improved features with Prime Option Visa but not with the

Discover Card. Any or all of these possibilities, Visa claims, will eventually lead to the demise of the Discover Card, thereby decreasing competition on the intersystem level.

Sears presented evidence to contradict Visa's assertions. Most important was testimony supporting Sears' contention that the Discover Card would continue to be a viable competitor in the general purpose charge card market. First, Sears asserted that Visa's duality analogy was inappropriate because Prime Option Visa was designed to reach that part of the market that Discover does not reach.[34] Furthermore, Sears claimed that it had no desire to convert Discover to a Visa card because Discover has been, and continues to be, a very successful, money-making venture.

In assessing each of Visa's arguments concerning the competitive benefits of Bylaw 2.06, the court concludes that a reasonable jury could have determined that the harmful effects on competition substantially outweigh any beneficial effects. The court cannot find, as a matter of law, that the jury erred in making its determination.[35]

4. Antitrust Injury

Visa asserts that Sears has not suffered any antitrust injury as a result of Bylaw 2.06. First, Visa argues that Sears has not been injured because Sears' inability to issue a Prime Option Visa card has not prevented Sears from competing in the market generally. In addition, Visa asserts that Sears is capable of offering a card with

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[34] Sears presented credible evidence that the Discover Card has more appeal to persons who tend to promptly pay their credit card balances, referred to in the industry as "transactors," than it has to persons who carry credit card balances from month to month, referred to in the industry as "revolvers." Visa and MasterCard are used primarily by revolvers. Prime Option Visa is designed to appeal to revolvers, rather than transactors, and in that sense is not expected to be in direct competition with the Discover Card.

[35] Again, the court notes that it was possible that the jury found all of Visa's arguments concerning intersystem competition persuasive. However, the jury may still have concluded that the harms to competition substantially outweighed the benefits.

Prime Option's features as a different version of the Discover Card or as an independent proprietary card. Visa contends that the only "benefit" Sears has been denied is that Sears is unable to capitalize on the value attributable to Visa's trademarks, systems, and merchant base.

Sears argues, on the other hand, that it suffered antitrust injury as a result of Bylaw 2.06, regardless of its decision not to launch Prime Option independent from the Visa system. At trial, Sears presented evidence that issuing Prime Option as a separate proprietary card would not have been as profitable as issuing a Prime Option Visa. Sears argues that the most effective business plan was to pursue its multi-card strategy–issuing Discover as a proprietary card, and Prime Option as a Visa card. Mr. Purcell, president of Dean Witter, testified that if he had known Visa would change its rules not to allow Sears to issue both a national proprietary card and a national Visa card, he would not have supported the idea to issue Discover first and then issue a Visa card or MasterCard card.

The court finds that Sears presented sufficient evidence at trial from which a reasonable jury could find that Sears suffered antitrust injury as a result of Bylaw 2.06. The fact that Sears could have perhaps reduced its injury by issuing Prime Option outside the Visa system does not mean it suffered no antitrust injury. If Visa's action resulted in a restraint of trade, it is not a defense to argue that no injury would have resulted if Sears had simply decided not to challenge the bylaw and instead issued Prime Option independently. *See Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert. denied*, __U.S.__, 113 S. Ct. 409, 121 L.Ed.2d 334 (1992) (trial court held that when restraint of trade is found, it is no defense if injury could have been avoided by signing a different contract or striking a different bargain).

The evidence at trial indicates that Sears would benefit significantly from issuing Prime Option Visa as opposed to Prime Option Discover or another separate proprietary card. Sears presented sufficient evidence for the jury to determine that Sears was injured because it was prevented from issuing the Prime Option Visa card.

Based on the foregoing the court finds that the jury could have reasonably found that Bylaw 2.06 is an unreasonable restraint of trade in the general purpose charge card market and that Sears suffered antitrust injury as a result. Visa's factual argument based on Rule 50(b) is denied.

C. Sears' Disincentive Evidence: Standing & Injury

In an argument somewhat related to the injury issue discussed in the foregoing section, Visa asserts that the court erred in allowing Sears to present its disincentive evidence to the jury. Visa submits that Sears suffered no injury from the alleged disincentive aspects of Bylaw 2.06, and therefore lacked standing to present such evidence.

The court agrees that the disincentive argument apparently does not apply to Sears. Sears argued that Bylaw 2.06 acts as a disincentive to the creation of new proprietary cards by threatening exclusion or expulsion from the Visa system. Sears presumably did not suffer any antitrust injury from Bylaw 2.06's disincentive effects. Because Sears is already excluded from membership in Visa, there can be no realistic disincentive for Sears to create additional proprietary cards.[36] This does not mean, however, that the admission of the disincentive evidence was improper. The disincentive evidence, although irrelevant to the question of antitrust injury, is relevant to the jury's Rule of Reason inquiry regarding the anticompetitive effects of Bylaw 2.06.

Sears had standing to bring its Section 1 claim against Visa on the basis of its allegation that it was wrongfully excluded from Visa membership. When a plaintiff has established standing to challenge a restraint, it may present relevant evidence as to all anticompetitive effects of the restraint in the relevant market. It is not limited to those effects which directly affect the plaintiff.

The question of antitrust injury, of course, is a separate inquiry. If the fact-finder determines that a restraint of trade is unreasonable, it must then determine whether there is sufficient evidence to find

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[36] It is conceivable that Sears could argue that it was affected by the disincentive aspects of Bylaw 2.06 because Sears would choose membership in Visa over continuing to operate the Discover Card, but Sears offered no evidence to support such an argument.

that the plaintiff suffered antitrust injury as a result of the unreasonable restraint. This inquiry is properly limited to evidence relevant to the plaintiff's alleged injury.

Visa's argument confuses the issue of standing with admissibility of evidence. All evidence of anticompetitive effect is relevant to the Rule of Reason examination. The fact that such evidence is not relevant to the injury inquiry does not render it inadmissible, unless it is unfairly prejudicial or otherwise objectionable under Rule 403 of the Federal Rules of Evidence. In this case, no such objection was warranted. Accordingly, Sears' evidence of the disincentive aspects of Bylaw 2.06 was properly admitted as evidence of the bylaw's effect on competition in the relevant market.

Visa argues, however, that such a holding allows Sears to "mix and match" its claims–it allows Sears to prove an antitrust violation based solely on its disincentive evidence, while proving injury based on its exclusion from the Visa system. *Visa's Nov. 24, 1992, Mem.*, at 54-55. Such a result, however, was precluded by the court's instructions to the jury.[37] These instructions, together with the special

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[37] The jury was instructed on the issue of injury as follows:

If you determine that Visa has unreasonably restrained trade in the relevant market, you must next determine whether Sears was injured by Visa's actions. Proving injury does not require Sears to prove a dollar amount, but only that Sears was in fact injured by Visa's alleged restraint of trade. It is important to understand that injury and the amount of damages are different concepts. In this trial, you will not be determining the amount of damages, if any, suffered by Sears.

To establish injury, Sears must have offered evidence which establishes as a matter of fact and with a fair degree of certainty that Visa's alleged illegal conduct was a material cause of Sears' injury. This means that Sears must have proved that some injury flowed to it as a result of Visa's alleged restraint of trade. If the injury would be merely incidental or inconsequential, or if Visa's antitrust acts would be so removed from the injury as to be only remotely causative, then Sears would not be injured by reason of anything forbidden in the antitrust laws. Sears is not required to

verdict form, made it clear that the question of injury is a separate inquiry from the reasonableness determination. The jury was instructed that Sears carried the burden of proof as to each issue, and that each inquiry must be supported by the evidence. The jury was instructed that Sears' alleged injury must flow from the antitrust violation. This precluded a "mix and match" verdict.

The court has found that evidence of the exclusion of Prime Option Visa from the market was sufficient to support a finding of antitrust injury. It follows, therefore, that the jury's finding of antitrust injury rested on this argument. It also follows that the jury's finding of substantial harm to competition rested, at least in part, on this same argument. The court's instruction informed the jury that Sears' injury must be the result of the alleged antitrust violation. If the jury's finding of violation rested solely on Sears' disincentive evidence, it would not (and could not) have found that Sears suffered antitrust injury. Implicit in the jury's finding of antitrust injury is a finding that the exclusion of Sears from Visa contributed to the substantial harm to competition.[38]

> prove that Visa's alleged restraint of trade was the sole cause of its injury; nor need Sears eliminate all other possible causes of injury to establish causation. It is enough if Sears has proved that the alleged restraint of trade was a material cause of its injury. However, if you find that Sears' injury was caused by something other than the alleged restraint of trade, then you must find that Sears has failed to prove the fact of injury.

Jury Instruction 24. It is assumed that the jury followed this explicit instruction and based its answer to the question regarding antitrust injury on a finding that Sears suffered antitrust injury as a result of Visa's antitrust violation.

[38] Visa argues that a new trial may be required "since it is impossible to tell from the jury's verdict whether their respective determinations of illegality and fact of injury were predicated on one claim rather than the other . . . ." *Visa's Nov. 24, 1992, Mem.*, at 55 n.53.

This argument was reiterated by Visa in a letter dated January 27, 1993. There, Visa submitted to the court a recently decided United States Supreme Court case, *Spectrum Sports, Inc. v. McQuillan*, __U.S.__, 113 S. Ct. 884, 122 L.Ed. 247 (1993). Visa asserts that this ruling supports the

II. THE CLAYTON ACT COUNTERCLAIM

The court now turns its attention to Visa's Counterclaim. The Counterclaim was tried in equity to the court based on the same evidence presented at trial relevant to Sears' Sherman Act claim. In its Counterclaim, Visa seeks an injunction under Section 16 of the Clayton Act to prevent Sears from attaining Visa membership. This request for injunctive relief is based on Visa's assertion that Sears' entry into the Visa joint venture as a member-owner would violate Section 7 of the Clayton Act. Section 7 prohibits any person engaged in commerce from acquiring the stock or assets of another when "the

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proposition that "a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987). In *Spectrum Sports*, the jury found the defendant liable under Section 2 of the Sherman Act, but it was unclear whether the jury based its decision on a finding of monopolization, conspiracy to monopolize or attempted monopolization. Because there was insufficient factual evidence to support a finding of attempted monopolization and it was possible that the jury rested its decision regarding liability on that theory alone, the Supreme Court held that the case had to be retried. In the instant case Visa argues that because the jury verdict with respect to injury does not indicate what evidence was the basis of the jury's decision, the verdict must be set aside.

Visa's argument and the holding of *Spectrum Sports*, however, have nothing to do with the present case. Here, it is not impossible to tell upon what evidence the jury relied in making its determination of injury. As discussed above, Sears' exclusion evidence was the basis for the jury's finding of antitrust injury. Likewise, this evidence was necessarily relied upon, at least in part, in finding the restraint to be unreasonable. *Spectrum Sports* stands for the simple proposition that if one theory upon which a verdict of liability may have been based was improperly submitted to the fact-finder the case must be retried. That is obvious because the verdict may rest on an impermissible legal standard. But such a concept has no application whatsoever in this case in which all evidence of liability (both disincentive evidence and Sears' exclusion evidence) was properly admitted, and in which the jury was properly instructed that Sears' injury must flow directly from the anticompetitive restraint. In *Spectrum Sports* an improper theory was submitted to the jury. No such submission occurred here.

effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C.A. § 18 (Supp. 1992).[39] "The entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions," are "within the scope of § 7." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342, 83 S.Ct. 1715, 1730, 10 L.Ed.2d 915 (1963).

The purpose of Section 7 is "to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171, 84 S.Ct. 1710, 1717, 12 L.Ed.2d 775 (1964). Section 7 is violated when "a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown." *Id.* In determining whether there has been a violation of Section 7 of the Clayton Act, it must be shown that the effect of the acquisition at issue "may be substantially to lessen competition [ ] in any line of commerce in any section of the country." *Philadelphia National Bank*, 374 U.S. at 355, 83 S.Ct. at 1737.[40]

Visa claims that competition in the relevant market would be adversely affected if Sears were to attain Visa membership, and consequently seeks an injunction. Sears, on the other hand, claims

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[39] The statute provides, in pertinent part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C.A. § 18 (Supp. 1992).

[40] "Line of commerce" refers to the relevant product or services market. *Philadelphia National Bank*, 374 U.S. at 356, 83 S.Ct. at 1737. The term "section of the country" applies to the relevant geographical market for the product. *Id.* In the instant case, the parties have agreed that the relevant market is the general purpose charge card market for the United States.

that its entry into the Visa system will stimulate competition in the general purpose charge card market.

A. Standing

A private party such as Visa must have standing to seek an injunction under Section 16 of the Clayton Act. Section 16 provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C.A. § 26 (Supp. 1992). However, under Section 16, the threatened injury must be "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)); *see also Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183 (10th Cir. 1983). In short, to have standing, Visa must have a sufficient stake in a justiciable controversy to seek judicial resolution. *See Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972).

Because the antitrust laws were designed to protect competition, not competitors, a mere threat of lost profits, for example, does not normally by itself constitute an appropriate antitrust injury under Section 16. *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697 (*citing Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)). Rather, an antitrust "injury should reflect the anticompetitive acts made possible by the violation." *Id.*, 429 U.S. at 489, 97 S.Ct. at 697. In the instant case, unless Visa's alleged injuries are tied to the possibility of decreased competition prohibited by Section 7 of the Clayton Act, Visa has not suffered an antitrust injury and would have no standing to seek injunctive relief.

Visa asserts that if Sears is allowed to join the Visa system, Discover will have access to confidential information concerning Visa marketing plans and other strategies. With such information, Visa argues, Sears could develop business plans to Discover's advantage. As such, Discover would have an unfair marketing advantage over Visa issuers which could result in a lessening of intrasystem and intersystem competition. Ultimately, some Visa

members would be unable to effectively compete. As a result, Visa's potential injury in such case would be directly related to the decrease in competition in the market.

In another argument to support standing, Visa asserts that Sears will obtain an unfair competitive advantage over other Visa member banks if Sears is allowed to issue Prime Option Visa. This unfair advantage will occur, Visa asserts, because Sears will be able to offer potential cardholders and merchants both Visa and Discover cards which other Visa members cannot do. The court finds that it is possible that this unfair competitive advantage could be accompanied by a reduction in competition between the two systems, which could possibly result in harm to Visa members.

Based on these claims of potential injury and decreased competition, the court finds that Visa has standing to bring its Counterclaim under Section 7 of the Clayton Act.

B. Application of the Merger Doctrine

After standing has been determined, the court must analyze the probable effects on competition in the general purpose charge card market if Sears, the sole issuer of the Discover Card, is allowed to enter the Visa joint venture as one of 6000 member-owners. Visa argues that Sears' attempt to join the Visa system is a "partial merger" of the two companies, and urges the court to analyze the impact on competition by applying antitrust law relevant to mergers. Such a "merger doctrine" analysis has been applied to joint ventures because "the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170, 84 S.Ct. 1710, 1716, 12 L.Ed.2d 775 (1964).[41]

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[41] *Penn-Olin* involved the joint participation of two corporations in the creation of a third. In comparing such a joint venture to a merger, the Court stated:

> The joint venture, like the "merger" and the "conglomeration," often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with

The instant case does not fit neatly into a merger analysis. Here, if Sears were to join the Visa joint venture, neither corporation would gain complete control of the other. However, there is no doubt that Section 7 applies to this "hybrid" case because, although considered an "anti-merger" statute, the very language of Section 7 makes clear that a "company need not acquire control of another company in order to violate the Clayton Act." *Denver & R.G.W.R.R. Co. v. United States*, 387 U.S. 485, 501, 87 S.Ct. 1754, 1764, 18 L.Ed.2d 905 (1967). The court, therefore, agrees that merger law, although not controlling, is at least a starting point for the analysis required under Section 7.

Under merger analysis, Sears' joining Visa as a member-owner would be characterized as a "horizontal" arrangement[42] because Discover and Prime Option Visa perform "similar functions in the production or sale of comparable goods or services." *Brown Shoe Co. v. United States*, 370 U.S. 294, 334, 82 S.Ct. 1502, 1529, 8 L.Ed.2d 510 (1962). In general, when an acquisition effects a horizontal merger between companies occupying the same relevant market, competition that previously existed between the two is eliminated. *Id.* at 335, 82 S.Ct. at 1529. When such a merger creates one "firm

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> one another. The result is "a triumvirate of associated corporations." If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

Penn-Olin, 378 U.S. at 169, 84 S.Ct. at 1716 (footnote omitted).

[42] The court rejects Sears' assertion that the Clayton Act counterclaim requires an analysis based on a "vertical" merger. If the "merger" here were vertical, Sears would not have been allowed to bring an action under Section 1 of the Sherman Act. Furthermore, what must be examined is the effect on competition if the same parent organization, Sears, were to issue Prime Option Visa and Discover, two competing charge cards. If the "merger" were to occur, Prime Option Visa and Discover would be offering comparable goods, i.e., general purpose charge cards.

controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," the United States Supreme Court has recognized a prima facie violation of Section 7. *United States v. General Dynamics Corp.*, 415 U.S. 486, 497, 94 S.Ct. 1186, 1193, 39 L.Ed. 2d 530 (1974) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963)); *see also Brown Shoe*, 370 U.S. at 343, 82 S.Ct. at 1533 (stating market share resulting from merger is one of the most important factors when determining probable effects on competition). The presumption has been created because significant market concentration makes it "easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (quoting *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282-83 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990)).

Evidence of such undue concentration in a market is usually presented in the form of market share statistics designed to signal the potential likelihood of collusion between firms. The most prominent of these statistical methods of measuring market concentration is the Herfindahl-Hirschman Index ("HHI"). *University Health*, 938 F.2d at 1211 n.12. The HHI is calculated by squaring the market share of each company in the relevant market, and then adding the squares. *Id.* "This formula reflects the distribution of market shares between firms and gives proportionately greater weight to the market shares of the larger firms, which likely accords with their relative importance in any anti-competitive interaction." *United States v. Rockford Memorial Corp.*, 717 F.Supp. 1251, 1279 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990)). *Rockford Memorial*, 717 F. Supp. at 1279. When a market consists of many firms of approximately equal size, the HHI approaches zero. *Id.* Once a pure monopoly has been created, however, the HHI reaches its maximum of ten thousand. *Id.*

The United States Department of Justice uses the HHI in assessing possible violations of Section 7. Department guidelines characterize a market as highly concentrated if the HHI exceeds 1800. *University Health*, 938 F.2d at 1211 n.12 (citing U.S. Dep't of

Justice, Merger Guidelines §§ 3.1, 3.11(c), 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,560-61 (1988)). In such a concentrated market, any increase of the HHI by 50 or more raises serious antitrust concerns. *Id.* Furthermore, any merger that increases the HHI by more than 100 and results in a post-merger level of 1000 or more signals a red flag. *Id.* In both situations, courts have recognized a prima facie violation of Section 7.

During trial, to rebut Sears' Sherman Act claim, Visa argued that the market for all charge card issuers is highly unconcentrated. This low concentration is obtained when each of the 6000 Visa and MasterCard issuers is viewed as a single company and the market share of each issuer is squared and added together. But in its Clayton Act counterclaim, Visa urges the court to analyze the market on a "system-wide" basis, viewing the Visa and MasterCard joint ventures as single companies. Under such a view, market share would be determined by adding together the individual shares of each system. Such a "system-wide" analysis, which Visa advocates under the Clayton Act, would result in a highly concentrated market.

Based on testimony by Sears' expert, Professor Kearl, Visa asserts that the relevant market shares are as follows: Visa 45.6%; MasterCard 26.4%; Discover 5.5%; American Express 20.5%; and Diners Club 2.0%. Using these figures, Visa claims that the HHI for the general purpose charge card market is 3231,[43] well above the Justice Department's "highly concentrated" merger threshold of 1800. Visa argues that Sears' acquisition of a Visa membership through Prime Option would increase the HHI to 3732, [44] an increase of more than 100 under the merger guidelines.[45] As a result, Visa

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[43] This figure of 3231 is obtained by squaring the market shares of each system issuer and then adding the total: $45.6^2 + 26.4^2 + 5.5^2 + 20.5^2 + 2.0^2 = 3231$.

[44] This figure of 3732 is obtained by adding Discover's market share of 5.5% with Visa's share of 45.6% for a total of 51.1%. That figure is then squared and added to the squares for the other systems: $51.1^2 + 26.4^2 + 20.5^2 + 2.0^2 = 3732$.

[45] Visa points out that under Dr. Kearl's view, of the general purpose charge card market, the market shares of Visa and MasterCard

claims that it has presented a prima facie case that Sears' proposed membership in Visa would substantially lessen competition in the future.

The court does not agree that the "merger" at issue would result in a significant increase in the concentration of companies in the relevant market under an HHI analysis. First, the court does not find it appropriate to view the general purpose charge card market on a system-wide basis for the purpose of an HHI analysis. Persuasive evidence was presented which showed that intrasystem competition within Visa and MasterCard is vigorous. For example, evidence showed that the Visa and MasterCard systems are not proprietary, but rather are owned by approximately 6000 members. Furthermore, members are free to set their own prices and output, and both systems generally remain open to new members, including significant competitors such as AT&T, GTE and General Motors Corporation. Based on this evidence, the court agrees with Visa's expert Professor Schmalensee that *each* individual issuer of Visa and MasterCard cards should be included in the HHI analysis, resulting in a system HHI of below 500.[46]

Next, even if the court were to accept Visa's argument that market share in the general purpose charge card market should be measured on a system-wide basis, the court still does not find merit in Visa's HHI argument. Visa's analysis depends on a true merger between the parties in which Discover's market share would be subsumed within that of the entire Visa system. Such a characterization of the market system, however, is inaccurate and

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should be combined, yielding a total market share of 72%. Using this figure, Visa asserts that the market would then have a pre-"merger" HHI of 5639, and a post-"merger" total of 6431. This change in the HHI would make out a prima facie case of a Section 7 violation.

[46] In making this assertion, the court does not claim that the Visa association lacks market power. Rather, the court believes that the HHI analysis deals strictly with the concept of market shares, and is most helpful in assessing the possible impact on competition when companies combine their market shares through merger or the creation of joint ventures. The court finds, however, that the HHI is not particularly helpful in assessing the impact on competition under the facts of this case.

misleading. The court has found that Discover Card will remain a viable competitor in the relevant market. Visa will have no control over Discover Card, and Sears will not control the Visa system.[47] Consequently, Sears' entry into the Visa system through Prime Option cannot be deemed a merger of Discover Card and Visa. For purposes of the HHI analysis, therefore, the relative market shares of Visa and Discover would not be affected and the HHI would remain unchanged.

Based on the court's assessment of Visa's HHI argument, the court finds that Visa has not met its burden of showing anticompetitive effects based on the HHI analysis of concentration of companies in the market. *University Health*, 938 F.2d at 1218; *see Philadelphia National Bank*, 374 U.S. at 363, 83 S.Ct. at 1741. Therefore, the court concludes that Visa has not made out a prima facie case under Section 7.

C. Determination of Anticompetitive Effects

Because there has been no prima facie showing of anticompetitive effects by Visa, the court must examine the probable effects of the merger to determine whether there exists a possible substantial lessening of competition or a tendency to create a monopoly in the general purpose charge card market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317, 82 S.Ct. 1502, 1519, 8 L.Ed.2d 510 (1962). Probabilities are the focus of the inquiry because "section 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (citing

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[47] The court recognizes that Visa and Discover will not remain entirely independent. Sears, the owner of Discover, will presumably control a share of the Visa system through Prime Option. However, Sears would be only one of approximately 6000 Visa issuers. Even if Sears were to meet its stated goal of becoming one of the five largest Visa issuers, (*see* Tr. at 187; Def.'s Ex. 72, at S112131), its market share of the Visa system would be less than 10%. This would not constitute a complete merger of the two entities. At best, it could be called a partial or hybrid merger. Under such circumstances, the court finds that the HHI analysis is not particularly useful in determining the probability of anticompetitive effects.

Brown Shoe Co. v. United States, 370 U.S. 294, 317, 322, 82 S.Ct. 1502, 1519, 1522, 8 L.Ed.2d 510 (1962)).

In analyzing the possible harms and benefits, the court should have "a firm understanding of the structure of the relevant market." *Philadelphia National Bank*, 374 U.S. at 362, 83 S.Ct. at 1741; *see Brown Shoe*, 370 U.S. at 321-22, 82 S.Ct. at 1521-22. Without such understanding, it would be difficult for the court to accurately determine what effects Sears' membership in Visa would have on the general purpose charge card market.

1. Analysis of the Market Structure

The history of the development of the general purpose charge card market, discussed in the Background section of this Opinion, has led the court to several conclusions regarding the present structure of the market. First, the court finds that the existence of joint ventures, such as Visa and MasterCard, has had a positive effect on competition and consumers. Only large firms with significant capital have the ability to enter the national charge card market as sole proprietors. The national charge card associations, as a result of their open membership policies, allow smaller institutions which would not normally be able to compete to enter the market. With no restrictions on price or output, these joint ventures have further benefitted competition and consumers because many smaller institutions, in order to effectively compete with the larger firms, offer highly competitive interest rates and other features. These conditions have led to healthy intrasystem competition among the members of Visa and MasterCard.

The evidence presented at trial also leads the court to conclude that different brands of general purpose charge cards appeal to different consumer interests. American Express, Diners Club and Carte Blanche appeal to the "transactional" consumer who wants, and has the ability, to pay off the entire balance each month. Visa and MasterCard, on the other hand, appeal to the customer who wants the option of revolving credit. Discover, with its no annual fee and cash-back features, appeals more to the transactor than the revolver, although clearly there are numerous Discover customers who revolve each month. These choices among the various charge cards promote competition by giving consumers alternatives when choosing which

card they prefer to carry, or if they carry more than one card, which one they prefer to use in a particular circumstance.

Finally, the court finds that intersystem competition has helped promote innovation in the development of transactional processing systems and merchant base expansion, thereby benefitting consumers. Therefore, the court concludes that intersystem competition is important in promoting consumer welfare in the general purpose charge card market.

2. Effects on Competition

Relying on the conclusions made above, the court now turns its attention to the possible effects on the market if Sears were to join Visa as a member-owner. Visa claims that Sears' entry into the joint venture may substantially lessen competition claiming that harm to competition may occur in two ways: 1) Discover will abandon its merchant discount competition and will cease its direct advertising competition against Visa; and 2) Sears will use its presence on the Visa board to obtain confidential information regarding Visa activities.

In response, Sears has argued that its entry into the Visa system as a member-owner has several benefits for competition. First, Sears claims that intrasystem competition among Visa members will increase due to the presence of the low-cost Prime Option card. In addition, Sears claims that its entry into the Visa system will encourage other companies who wish to issue both a proprietary card and a bankcard (i.e. Visa and MasterCard), to do so. Sears argues that Bylaw 2.06 at present is a disincentive to such companies because the bylaw forces companies to chose one type of card over another, thereby lessening intersystem competition in the general purpose charge card market.

As the fact-finder in the Clayton Act counterclaim, the court has analyzed the possible impacts on competition if Sears were to issue Prime Option Visa. In determining whether Sears' entry into the Visa system may substantially lessen competition, the court has weighed the possible harms of that entry against the possible benefits. First, the court agrees that intersystem competition will be decreased by Sears' entry into the Visa system as the owner of Prime Option

Visa. Sears' ownership of Prime Option Visa will likely cause Sears to change its marketing strategy, thereby decreasing competition between Visa and Discover to a certain degree. However, the court finds that competition between Discover and Visa will be far from eliminated, and Sears will continue to vigorously market the Discover Card.

Discover and Visa appeal to different consumer needs within the general purpose charge card market.[48] By launching Prime Option Visa, Sears does not intend that its customers abandon the Discover Card. Evidence was presented at trial that Sears intends that the Discover Card will "continue to grow in the business and . . . remain profitable." (Tr. at 986). Although such testimony may have been self-serving at the time, the court does not believe that Sears intends to abandon the Discover Card after its tremendous capital investment in the program and Discover's apparent unparalleled success. Rather, the evidence indicated that Sears intends Prime Option Visa to target the customer who prefers those features offered by bankcard issuers. The court concludes that the Discover customer to be targeted by Prime Option Visa is the customer who already carries, and uses, a bankcard of some type. Furthermore, the court believes that Sears' entry into the Visa system will not prompt the remaining 6000 Visa members to stop advertisements and promotions aimed at the Discover Card market. If Discover remains a healthy competitor, which the court believes it will, Visa will continue to have the incentive to vigorously compete.[49]

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[48] The court notes that competition between Visa and MasterCard decreased following duality. The court believes that one significant reason for this change was due to the fact that Visa and MasterCard are nearly identical products, appealing to the same consumer needs.

[49] Although the court must assess probabilities which might result from Sears' entry into the Visa system, it is difficult to properly assess whether American Express will follow Sears' lead and seek Visa membership. American Express issues the Optima "revolver" card and the "transactional" green card, but the court does not have facts before it concerning the type of consumer targeted by the Optima card. As a result, the court declines to conclude that American Express would also enter the Visa system, causing a lessening of competitive vigor of the Optima card.

The second possible impact on competition the court must assess is based on Sears' acquisition of confidential information regarding Visa's activities. The court agrees with Visa that Sears' presence on the Visa Board raises a concern regarding confidential information, and will likely cause a decrease in intersystem competition. *See F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979). However, the court finds that Visa has alternative remedies to this problem short of denying Sears membership in the Visa joint venture. It is certainly within Visa's power to provide for sanctions, including loss of membership, for any Visa member who shares confidential information with a competitor. As a result, the court finds the potential negative impact on competition is negligible.

Next, the court must assess the possible impact that Prime Option Visa may have on intrasystem competition. Sears claims that Prime Option Visa will stimulate intrasystem competition among Visa issuers. The court agrees that intrasystem competition may be increased in the short run by the entry of a lower-cost card such as Prime Option into the Visa system. This conclusion is supported by evidence at trial, including testimony by Visa's own expert as well as evidence that indicates an increase in competition following AT&T, GTE, and GM's entries into the Visa and MasterCard systems. The court, however, is not convinced that this increase in intrasystem competition will continue over the long run. In fact, in the court's opinion, it is merely a matter of time before Prime Option Visa becomes one of the largest members in the Visa system. As such, like the other large issuers, Prime Option will have an incentive to maintain higher-than-average interest rates. In the long-run, intrasystem competition may not be enhanced to any appreciable degree.

Finally, the court must examine Sears' argument that its entry into the Visa system will encourage other firms to issue both proprietary cards and bankcards, thereby increasing both intersystem and intrasystem competition. Sears makes this argument by asserting that Bylaw 2.06 is a disincentive to firms interested in issuing both a bankcard and a proprietary card. The court agrees that competition will be enhanced, but only to a small degree.

The court reaches this conclusion because very few firms are in a position to issue both a bankcard and a proprietary card due to the large amount of capital required to begin a proprietary card. However, because of the small number of systems in the general purpose charge card market, if just one firm is discouraged from issuing a proprietary card because of Bylaw 2.06, it would have a negative impact on competition in this market. The court is persuaded that such a possibility does exist after reviewing Visa's own exhibit listing twenty-one Visa members considered to have the capability of issuing their own proprietary cards.[50] However, the court finds the possible benefit derived from this "incentive" to be minor because even those firms with the capability are unlikely to undertake the high risk and large capital investment required to launch a proprietary card.

D. Conclusions Regarding Clayton Act Counterclaim

In analyzing the "acquisition" at issue in this case, the court concludes that there has been no showing that Sears' entry into the Visa system as a member-owner may substantially lessen competition in the general purpose charge card market. First, Visa has not made a prima facie showing of a Section 7 violation because Sears' joining Visa does not constitute a true merger. Furthermore, in analyzing the possible effects of Sears' entry into the Visa system, the court agrees that the probable harms to competition will outweigh the probable benefits, but not so substantially as to rise to the level of a Section 7 violation.

In quantifying the possible harms and benefits to competition, the court agrees that intersystem competition will likely be harmed because Discover will not compete as vigorously with Visa after it issues Prime Option, and Sears will have access to confidential Visa information. However, these probable harms will not be significant. Sears intends the Discover Card to remain strong in the general purpose charge card market, and Visa has means by which it can control the dissemination of confidential information.

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[50] See Pl.'s Ex. 297, at 70201150. The parent organizations of these 21 Visa members include such prominent companies as the Ford Motor Company, Merrill Lynch, Kemper Insurance, ITT, J.C. Penney, and Aetna Life & Casualty Co. *Id.*

These probable harms to competition are weighed against the probable benefits of Sears' entry into the Visa system. The court has found that these benefits are slight, but they offset the harms to some degree. Consequently, in weighing the possible effects, the court concludes that Visa has failed to show that competition in the general purpose charge card market may substantially lessen if Sears joins the Visa system.[51] Based on the foregoing, the court holds that Sears' entry into the Visa joint venture as a member-owner will not violate Section 7 of the Clayton Act. For that reason, Visa's Counterclaim is DISMISSED.[52]

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[51] The court's factual attitudes toward Sears' Sherman Act claim and Visa's Clayton Act counterclaim are identical. In both situations, the court sees the entry of Sears into Visa as slightly more harmful than helpful to competition, although not substantially more harmful. If before this litigation was ever commenced, the trial judge had been given the authority to tell Visa what it could or could not do under the antitrust laws, and Visa had then inquired whether it could keep Sears out of Visa, the answer would have been "yes." Conversely, if Visa had asked whether it could let Sears in the association, the answer would have also been "yes." Unfortunately for Visa, only the latter question was directed to the court while the former went to the jury, which said "no."

[52] Sears argues that the court is precluded from rendering a verdict in favor of Visa on the Clayton Act counterclaim unless the court also grants Visa's motion for judgment as a matter of law. Sears bases this assertion on the doctrine of collateral estoppel or issue preclusion.

It appears to the court that the better reasoning is that despite the jury's verdict, the court is not precluded from deciding the Clayton Act claim. *See Milonas v. Williams*, 691 F.2d 931, 935 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.Ed.2d 947 (1983) (trial judge entered permanent injunction against defendants despite jury's prior verdict in favor of defendants on damages issue). The court is not persuaded that collateral estoppel is applicable because of the different standards applied to the two causes of action at issue. Determination of the collateral estoppel issue, however, is not necessary here as the court does not find sufficient evidence to sustain a Clayton Act violation.

III. VISA'S MOTION FOR NEW TRIAL

Visa seeks a new trial pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. Rule 59 allows the court to grant a new trial "upon any grounds which, in the sound judgment of the trial court, [are] in the interest of the proper administration of justice." *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 642-43 (10th Cir. 1962). For such purposes, the court need not view the evidence in the light most favorable to the non-moving party, but is allowed to weigh the evidence and the credibility of witnesses. *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1266-67 (8th Cir.), *cert. denied*, 484 U.S. 855, 108 S.Ct. 161, 98 L.Ed.2d 116 (1987); *see Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir. 1972).

A. The Weight of the Evidence

Visa first argues that the jury's verdict in Sears' favor is against the weight of the evidence, and therefore, it is entitled to a new trial. As discussed previously, although the court may not agree with the jury's verdict, it cannot and does not hold that the verdict is so overwhelmingly against the weight of the evidence that a new trial should be granted.

B. Essential Fairness of the Trial

Visa next argues that it is entitled to a new trial because the trial was fundamentally unfair and materially prejudicial to its position. Specifically, Visa argues that it was denied a fair trial because (1) Sears' trial tactics placed excessive emphasis on issues that were only marginally relevant to a Section 1 claim; (2) the court refused to give limiting instructions requested by Visa, compounding the injustice inflicted on Visa by Sears' trial strategy; and (3) Sears did not present a proper antitrust lawsuit.

1. Sears' Trial Tactics

Visa complains that Sears engaged in trial tactics which undermined its right to a fair trial. Specifically, Visa argues that (1) Sears improperly raised an accusation of discrimination against Visa; (2) Sears' emphasis on Visa's "anti-Discover" campaign was prejudicial to Visa; (3) Sears' assertion of a "multi-card strategy" undermined Visa's right to a fair trial; and (4) Visa was prejudiced

when Sears invited the jury, by its verdict, to give consumers the "right to choose" whether Prime Option Visa should enter the market.

First, Visa complains that Sears improperly accused it of "discrimination." Sears presented evidence to show that one Visa member, Citibank, is allowed to issue both Diners Club and Carte Blanche as proprietary cards, while retaining its membership in Visa. This evidence, Visa argues, was improperly used to suggest that Visa acted unfairly and discriminatorily toward Sears, thereby prejudicing Visa in the eyes of the jury. Visa submits that the argument encouraged the jury to base its verdict on passion, prejudice, and notions of "fairness," rather than the governing antitrust laws.

Similarly, Visa argues that it was harmed by evidence of the "anti-Discover campaign." At trial, Sears presented evidence designed to show that shortly after the issuance of Discover, Visa took steps to hamper its success. Visa argues that Sears used this evidence to unfairly prejudice the jury, and to encourage an improper verdict.

The court finds, however, that neither of these trial tactics prejudiced Visa so as to require a new trial. With respect to these issues, the court gave a limiting instruction to the jury. The court instructed "that there is no contention or allegation in this case that any of these activities was unlawful. . . . This evidence was admitted so that you might understand the workings of the marketplace and the intent of the parties, in order to help you decide what effect the passage and enforcement of the amendment to Bylaw 2.06 has on competition in the relevant market." Jury Instruction No. 20.[53]

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[53] The entire text of Instruction 20 reads as follows:

During the trial you have heard evidence about certain business activities and decisions by both Sears and Visa. For example, you have heard evidence that Sears has refused to accept Visa cards in its department stores and that Visa has refused to let Sears issue a Visa card while permitting one of its members to issue Diners Club and Carte Blanche cards. You have also heard evidence about certain activities Visa undertook or encouraged its members to undertake after the Discover card was launched in early 1986 for the purpose of impeding Discover's success.

Visa's counsel proposed this language and did not object to the instruction. Given the fact that the jury was instructed as to the proper use of this evidence, the court does not find that its inclusion undermined Visa's right to a fair trial.

Visa next asserts that its right to a fair trial was hindered by Sears' evidence of a "multi-card strategy." At trial, Sears presented evidence that it intended to pursue a multi-card strategy from the outset. The evidence stated that prior to development of the Discover Card, Sears had decided to first issue a national proprietary charge card and then issue a national bank card such as Visa or MasterCard. Sears officers testified that they would not have issued Discover as a proprietary card had they known that such a decision would subsequently disqualify Sears from membership in Visa. Visa failed to object to this evidence when it was mentioned during Sears' opening statement and when it was presented during trial. However, Visa moved for a mistrial the day after this evidence was presented to the jury. At that time the court found that Visa had waived its right

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With regard to these various activities and decisions by Sears and Visa, I instruct you that there is no contention or allegation in case that any of these activities was unlawful. It is permissible for firms to choose how and with whom they will do business as long as such activity does not violate the antitrust laws. The antitrust laws do not necessarily require businesses to deal with similar firms in a similar manner. This evidence was admitted so that you might understand the workings of the marketplace and the intent of the parties, in order to help you decide what effect the passage and enforcement of the amendment to Bylaw 2.06 has on competition in the relevant market. You should give this evidence such weight, if any, that you believe it deserves in considering the actual antitrust claim made by Sears in this case regarding the competitive effect of Visa Bylaw 2.06.

Additionally, you have heard evidence concerning the fairness of certain activities undertaken by both parties. You are to consider such evidence only as it relates to or helps you understand the effect of the amendment to bylaw 2.06 on competition in the relevant market.

to object by failing to make a timely objection. Visa now raises the objection again in support of its motion for a new trial.

Again, the court rejects Visa's arguments on this point. The court finds that Sears presented this evidence to show that Bylaw 2.06, had it been in place when Sears first contemplated issuing a proprietary card, would have acted as a disincentive to Sears. The evidence was relevant to show that others may have had a similar disincentive. This evidence was also relevant to help the jury have a better understanding of the marketplace. In any case, the jury was instructed to base its verdict on the relevant antitrust laws, and not to be swayed by perceptions of fairness. Accordingly, the court finds that the evidence of Sears' multi-card strategy was relevant to the antitrust claim and was not unfairly prejudicial.

Finally, Visa asserts that Sears raised improper arguments during closing argument. Specifically, Visa objects to Sears' arguing that the jury should give consumers the "right to choose" whether Prime Option Visa may enter the marketplace. Visa claims that this argument is not legally relevant and was calculated to mislead the jury.

The court rejects this contention as well. First, Visa failed to raise an objection during the closing argument. Because of this failure to object, the court had no opportunity to cure any error. Accordingly, Visa has waived its right to object now. 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2472 (1971) ("A party will not be allowed to speculate with the court by letting error go unremarked and then seek a new trial on the basis of error if the outcome of the case is unfavorable to him.") In addition, the jury was instructed to follow the court's instruction of law with respect to the Sherman Act, and not the argument of counsel. Furthermore, it does not appear to the court that the comments complained of were harmful, clearly improper, or beyond the bounds of permissible argument. Consumer choice is the essence of competition. So long as the argument was focused on competition, the court finds that it was proper.

2. Supplemental Jury Instructions

Visa argues that the court erred in not giving certain of its proposed jury instructions. Specifically, Visa complains that it was prejudiced by the court's refusal to give Visa's proposed instructions 101, 102, and 103. Proposed Instruction 101 addressed the anti-Discover campaign,[54] Instruction 102 addressed the issuance of Carte Blanche and Diners Club charge cards,[55] and Instruction 103 sought

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[54] The entire text of Visa's Proposed Instruction 101 reads as follows:

> During the trial you have heard evidence about certain activities that VISA undertook or encouraged its members to take after the Discover card was launched in early 1986 for the purpose of impeding or preventing Discover's success. You have further heard testimony concerning what effect, if any, those activities had on the success of Discover.
>
> That evidence was admitted so that you might understand the workings of the marketplace including, in particular, the relations between the parties to this case. However, I instruct you that there is no contention or allegation in this case that such activities by VISA or its members were wrongful or that they violated the antitrust laws. As I have previously instructed you, it is the purpose of the antitrust laws to encourage vigorous competition. Accordingly, you should give evidence concerning VISA's activities in response to the introduction of the Discover card such weight, if any, that you believe it deserves in considering the actual antitrust claims made by Sears in this case, about which I previously have instructed you. However, you may not base any finding in this case upon a determination that the anti-Discover campaign was itself unlawful or anti-competitive.

[55] Visa submitted two versions of its Proposed Instruction 102. Version A reads as follows:

> You have heard evidence in this case about the fact that VISA has permitted others to become members of VISA since By-Law 2.06 was enacted and that it permits its members to issue other general purpose cards, such as MasterCard, Diners Club and Carte Blanche.
>
> The only issue before you is whether VISA By-Law 2.06

has unreasonably restrained competition in the market for general purpose charge cards in the United States. As to that issue, I instruct you that evidence concerning the issuance of other cards or the admission of other new members does not tend to prove that By-Law 2.06 is anti-competitive. The antitrust laws do not require businesses to deal with like firms in a like manner. This evidence was admitted solely to provide you with a full factual understanding of market facts which might be pertinent to the relations of the parties.

Visa's proposed Version B reads:

You have heard evidence on this case about the fact that VISA has permitted other firms to become members of VISA since By-Law 2.06 was enacted and that it permits its members to issue other general purpose cards, such as MasterCard, Diners Club and Carte Blanche.

The parties have submitted conflicting evidence on the nature and extent of the competition from such other card programs or systems and it is for you to resolve such conflicts. However, I instruct you that the antitrust laws do not require VISA to deal on the same or equal basis with other parties, be they members or non-members. Unless the effect of VISA By-Law 2.06 is to unreasonably restrain competition in the relevant market, a business such as VISA is free to determine for itself the parties with whom it will do business or share its property and it does not violate the antitrust laws for it to do business or share property with certain firms while refusing to do so with others, even others that are similarly situated.

Evidence concerning VISA's treatment of other firms has been admitted for the sole purpose of permitting you to understand the facts relevant to the market for general purpose credit cards and to help you evaluate VISA's purpose in enacting By-Law 2.06 in accordance with my prior instructions to you regarding intent. As the sole judges of the facts, you should resolve any conflicts in the evidence on this subject as you deem appropriate and should give this evidence such weight, if any, as you believe it is entitled on the issues I have mentioned. However, I instruct you that no finding of anti-competitive effect may be based upon the fact that VISA did not treat Sears and its affiliates in the same manner as it treated other businesses,

to preclude the jury from considering evidence of Sears' multi-card strategy.[56] These instructions were designed to instruct the jury to disregard certain evidence which Visa considered to be irrelevant and/or prejudicial.

The court finds, however, that it was not necessary to give these instructions. The basic concerns articulated in Visa's proposed instructions were addressed by the court's Instruction 20. As discussed in Part I of this Opinion, the disputed evidence was relevant to the antitrust claim. It was not necessary to prohibit the jury from considering such evidence, especially in light of Instruction 20 which limited the jury's use of such evidence.

As to Visa's Proposed Instruction 103, which sought to preclude the jury from considering evidence of Sears' multi-card strategy, the court again rejects Visa's argument. This instruction was an attempt by Visa to exclude evidence to which it failed to timely object and which the court has found to be relevant to Sears' disincentive argument. The court's refusal to give the proposed instruction was not prejudicial.

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whether or not you consider the reasons for such treatment to be fair.

[56] The entire text of Visa's Proposed Instruction 103 reads as follows:

> Sears has introduced evidence that in 1983 it adopted a multi-card strategy, that it did so in reliance upon VISA's membership rules as they then existed and that if Sears had known that VISA would thereafter change its membership rules Sears might have made different business decisions with respect to how it chose to enter the general purpose charge card market. VISA has offered contrary evidence on these issues.
>
> This evidence was admitted solely for the purpose of permitting you to understand the history of the relationship between the parties. I now instruct you that no claim of anticompetitive effect may be based on this evidence. There is no claim in this case, nor can there be, that VISA has violated the anti-trust laws by interfering with Sears' alleged multi-card strategy.

3. The Propriety of Sears' Antitrust Case

Visa finally argues that Sears did not try a "proper" antitrust case. Visa seems to argue that because it lost at trial, and because it had such a far superior case, Sears must have presented an improper case. However, the court does not in any way find that Sears tried an improper case. Sears' case was clearly effective and was tried in such a way that the jury understood Sears' position. Visa failed to object to any impropriety of this nature during the trial. Visa had every opportunity to present all evidence it chose to present. If Visa felt that certain antitrust issues were not sufficiently illuminated, it could have presented evidence to that effect to the jury. The jury system was fully utilized and available to both sides under the rules of civil procedure and the rules of evidence.

Based on the foregoing, Visa's motion for a new trial is **DENIED**.

SUMMARY AND CONCLUSION

For all of the above reasons, the verdict of the jury will stand. Visa's legal argument is without precedent and is contrary to the law of the Sherman Act. What Visa has, and has had from the beginning, is a factual argument that it wants to turn into a legal argument. It is understandable for Visa member banks to feel that it is somehow unfair that they should be required to allow one of their most successful rivals into their association.

Based on its exclusion from the Visa association, Sears filed suit under Section 1 of the Sherman Act, which clearly prohibits "combinations" unreasonably in restraint of trade. If Visa were a single entity the suit would have been summarily dismissed, but Visa is not a single entity. It is a combination of 6000 financial institutions, all of whom are joined together in a worldwide credit system whose modest goal is to be "everywhere you want to be." As a combination, Visa is subject to a Section 1 suit. As an allegedly efficiency-enhancing joint venture, Visa escaped a finding of *per se* illegality, and was entitled to a full Rule of Reason inquiry. This case is as simple as that, Visa's protestations and legal theses to the contrary.

Visa would have this court remake the Sherman Act to exempt this particular joint behavior from full antitrust scrutiny. It urges an extension of the concept of essential facilities into a legal requirement in refusal to deal cases, a meritless argument that, if adopted, would practically eliminate as potential antitrust plaintiffs all but the bankrupt, the defunct, and the discredited. Visa urges, as a matter of law, recognition of special antitrust deference to this type of joint venture in this type of circumstance. The argument is novel, but it has no support whatsoever in the law.

Visa's argument does have support in the facts, and Visa presented to the jury a credible and well-organized factual case. Sears did the same. Visa received what it was entitled to: a trial. Sears availed itself of the jury system, as was its constitutional right. The jury was by all indications attentive and diligent. The jurors sat patiently through three and one-half weeks of trial. They deliberated for two full days. During their deliberations, they asked to look at a transcript of the trial, which was provided to them. Each juror was given a set of the court's instructions on the law, which they were allowed to keep during deliberations. They were on time. They took notes. The jurors willingly did everything they were asked to do. Their task as fact-finders was not an easy one, and they carried it out in an admirable and conscientious fashion. They reached a verdict fairly and unanimously. Each juror was polled after the verdict was read. There was no doubt about their decision. It was reasonably based on the plaintiff's view of the evidence. Even though the trial judge may well have decided the Sherman Act claim differently than the jury, it was not mere "puffing" when he told the jury in instruction number two that "you are the exclusive judges of the facts."

This result is a proper validation of our jury system. To hold otherwise would be an unauthorized use of the court's powers. To grant Visa's legal motion would be to remake the law and thereby invade the province of Congress; to grant Visa's motion for a new trial or judgment notwithstanding the verdict would be to improperly intrude into the jury's exclusive domain. The court will do neither.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

Docket No. 91-C-47B
Decided Aug. 11, 1992

SCFC ILC, INC., d/b/a MountainWest Financial,

Plaintiff,

v.

VISA U.S.A. INC.,

Defendant.

VISA U.S.A. INC. and Visa International Service Association, Delaware corporations,

Counterclaimants,

v.

SEARS, ROEBUCK AND CO., a New York corporation; Sears Consumer Financial Corporation, a Delaware corporation, and SCFC ILC, Inc. d/b/a MountainWest Financial,

Counterdefendants.

Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, Ill., Gary F. Bendinger, Carol Clawson, Salt Lake City, William H. Pratt, Chicago, Richard W. Giauque, Salt Lake City, Utah, for plaintiffs and counter-defendant.

Dale A. Kimball, Heidi E. Leithead, Clark Waddoups, Salt Lake City, M. Laurence Popofsky, Stephen V. Bomse, Renata M. Sos, San Francisco, Cal., Scott R. Ryther, Jonathan A. Dibble, Elaine A. Monson, Don B. Allen, Salt Lake City, Utah, for defendants.

Dale Kimball, Heidi E. Leithead, Clark Waddoups, Salt Lake City, Utah, Judith Z. Gold, Susan Rice, Stephen V. Bomse, San Francisco, Robert G. Merritt, Renata M. Sos, San Francisco, Cal., Scott R. Ryther, Salt Lake City, Utah, for counter-claimant.

MEMORANDUM DECISION AND ORDER

BENSON, District Judge.

This case came on regularly for hearing before the court on July 30, 1992 on various motions filed by both parties. The plaintiff[1] was represented by William H. Pratt and Gary F. Bendinger. The defendant was represented by M. Laurence Popofsky, Stephen V. Bomse, Dale A. Kimball, Clark Waddoups and Renata M. Sos.

The court heard argument on various motions including: 1) Visa's Motion for Summary Judgment on Sears' antitrust claim based on Section One of the Sherman Act; 2) Sears' Motion for Summary Judgment on Visa's antitrust counterclaim based on Section Seven of the Clayton Act; 3) Sears' Motion for Summary Judgment on Visa's non-antitrust counterclaims; 4) Sears' Motion to Bifurcate the trials of the antitrust and non-antitrust counterclaims; 5) Visa's Motion to Compel Discovery; 6) Sears' Motion to Compel the return of privileged documents; 7) Sears' Motion to Quash the subpoena sent to Sears' legal counsel, Kirkland & Ellis; and 8) Visa's Motion for Additional Discovery. At the hearing, the Court granted Visa's Motion for Additional Discovery, allowing Visa the opportunity to depose Mr. B.J. Martin regarding Sears' plan for Prime Option in light of Sears' recent Salt Lake City-based press conference on the subject. In this order, the court will not address further the Motion for Additional Discovery.

BACKGROUND

The background of this case is set forth in this court's previous order at 784 F.Supp. 822 (D. Utah 1992). Briefly, some of the pertinent facts are as follows. Visa is a joint venture corporation that has credit card agreements with approximately 19,000 financial

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[1] Throughout the plaintiff's briefs, it has referred to itself as MountainWest. For purposes of this order, when referring to the plaintiff generally, the court will use Sears.

institutions in the United States. Sears is the owner of the Discover card, a nationally distributed credit card which competes for business with Visa. In 1989, Sears applied for a Visa membership through Greenwood Trust, a Delaware bank owned by Sears. According to a memorandum written by the then Senior Vice President for Operations of Discover Card, B.J. Martin, at least one purpose of the application was to permit Discover to "learn everything that was going on with its competitor, Visa." Visa denied the Greenwood Trust application and at the same time passed Bylaw 2.06 which would prevent Sears, any Sears affiliate, or any other direct competitor of Visa from becoming a Visa member.

Bylaw 2.06 reads as follows:

> If permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

After Visa's adoption of Bylaw 2.06, the top-ranking official of Sears Financial personally visited several Visa directors to dispute Visa's decision to pass Bylaw 2.06, and to threaten legal action if Visa failed to change the bylaw. No legal action was taken at that time.

In May 1990, Sears tried again to gain entry into Visa by purchasing from the Resolution Trust Corporation the assets of MountainWest Savings and Loan, an insolvent Savings and Loan in Sandy, Utah, that had a relatively small Visa membership of approximately 6,000 cardholders. Sears was aware of Visa's desire not to allow Sears as a member. Sears' acquisition of MountainWest was not communicated directly to Visa. However, Visa eventually discovered MountainWest's affiliation with Sears when Datacard, a credit card printer, requested that Visa approve the design of a new MountainWest Visa card blank and the printing of 1.5 million MountainWest Visa cards. Visa was informed by Datacard that the entity placing the order was Discover Card Services. The entity placing the order, however, was not Discover but was in fact Sears

acting through MountainWest. Sears did not expect this information to be communicated to Visa and instructed Datacard to tell Visa that the identification of Discover as the card issuer on the previous order had been due to Datacard's mistake. Nonetheless, Visa discovered the true identity of the owner of MountainWest and refused to authorize the printing of the 1.5 million MountainWest Visa credit cards. This lawsuit ensued.

DISCUSSION

I. *Visa's Motion for Summary Judgment*

A. Visa's Argument

Visa argues that it is entitled to Summary Judgment because the antitrust laws of the United States do not require a private business such as Visa to share its property with competitors. Visa asserts that because of its affiliation with Sears, MountainWest should not be allowed to become a member of Visa. Sears, Visa maintains, is a viable competitor in the credit card business, and does not need to be a member of Visa in order to successfully compete in the credit card market. Visa contends that "[a] joint venture's refusal, without more, to share its property with a competitor creates no viable antitrust claim. So long as the venture, itself, exists for legitimate, efficiency-creating purposes it has no more of a duty to share the fruits of its effort and innovation than any other lawful private business." (Visa's Memorandum in Support of Summary Judgment at p. 7). Furthermore, Visa claims that Sears can present a viable antitrust claim only if (1) Sears proves that Visa possesses market power in the relevant market and Sears is foreclosed from competition with cardholders and merchants; or (2) a Visa membership is an essential facility for Sears to compete in the general purpose credit card market.

In addition, Visa argues that Sears cannot prove that its exclusion by Visa has harmed competition in any way. Visa asserts that its actions are neither the type of restraint nor the type of harm that the antitrust laws were designed to cover. Visa asks the court to find as a matter of law that its policy assertions are correct.

Visa maintains that a business built and made successful by its members cannot be forced to share with competitors what it has

created. In other words, Sears should not be allowed a "free ride" on Visa's joint venture.

B. Sears' Argument

Sears asserts that Visa is not entitled to Summary Judgment because there are genuine issues of material fact that require this case to go to trial. Sears maintains that Visa has little direct legal support for its assertions. Sears contends that an open membership joint-venture such as Visa does not have an unqualified right to refuse to grant membership status to a competitor. Such a refusal, says Sears, must be in accordance with the antitrust laws. In this case, Sears argues that Visa's refusal to grant admission to Sears as a Visa member constitutes an illegal use of market power with a result that is anticompetitive in violation of Section One of the Sherman Act.

C. The Relevant Law

This is a unique case in antitrust jurisprudence. There is no controlling authority directly on point. There are, however, a number of cases, while not identical to this case, which offer guidance for resolving Visa's Motion for Summary Judgment.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985), is instructive. Northwest Wholesale Stationers was a cooperative made up of approximately 100 office supply retailers in the Pacific Northwest. Pacific Stationery & Printing Co. was expelled from the cooperative without explanation. The issue before the Supreme Court was whether the expulsion of Pacific was an unreasonable restraint of trade in violation of Section One of the Sherman Act. Pacific challenged the action of Northwest in barring it from continued membership. In determining whether Northwest's actions were *per se* illegal, the court held that "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296, 105 S.Ct. at 2620-21. The Court further held that "[a]bsent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Id.* at 297, 105 S.Ct. at 2621. While *Northwest Wholesale* differs from the case at bar, its

treatment of a cooperative gives significant guidance to the court on how it should treat a joint venture.

Visa is not persuasive in its argument that a joint venture has absolutely no duty to allow into its venture a competitor and that the antitrust laws cannot force it to allow Sears into the Visa joint venture. The Supreme Court has stated unequivocally that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985). While *Aspen Skiing Co.* was a case brought under Section Two of the Sherman Act, the analysis in this instance between Section One and Section Two is similar. Visa's argument that it has an absolute right not to deal with Sears is inaccurate. That right is a qualified right which must comply with the antitrust laws.

Visa argues that a joint venture, whether its membership is open or closed, should be treated like a single entity with the ability to exclude any of its competitors. An open joint venture, such as Visa, is similar to the cooperative in *Northwest Wholesale*. As in *Northwest Wholesale*, the Court must apply a rule-of-reason analysis. *Id.*

"[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). Under the rule-of-reason analysis, the competitive effects of an agreement "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692, 98 S.Ct. at 1365. The Supreme Court has held that it is inappropriate for this court, as Visa asks it to do, to determine on the present state of the factual record that Visa's policy position is correct. "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.; see also, Eastman Kodak Co. v. Image Technical Services, Inc.*, ___ U.S. ___, ___-___, 112 S.Ct. 2072, 2088-89, 119 L.Ed.2d 265 (1992)

("[W]hen we weigh the risks of determining procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment."). Visa's policy argument is well taken by the court, but this court can only follow the law as articulated by statute and cases. This court cannot make policy. Visa's argument is better suited in this instance as one made at trial.

D. Section One of the Sherman Act

Sears' complaint is brought under Section One of the Sherman Act. Section One prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Section One has been interpreted as prohibiting only "unreasonable" restraints of trade. *Northwest Wholesale*, 472 U.S. at 289, 105 S.Ct. at 2616. In order to determine whether Visa violated Section One, the rule-of-reason must be used. To prove a violation of the antitrust laws using the rule-of-reason, Sears must submit sufficient evidence to prove that an agreement existed which unreasonably restrained trade in the relevant market. *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 959 (10th Cir.) *cert. denied, Blue Cross & Blue Shield Inc. v. Reazin*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990). Furthermore, the inquiry is whether "the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers*, 435 U.S. at 691, 98 S.Ct. at 1365.

The court cannot find from the facts, submitted to date by the parties, using the rule-of-reason analysis, that the antitrust laws were or were not violated. The court must be fully informed of all the facts in order to make such a decision. There are numerous facts in dispute that require the court to hear the evidence at trial. Generally speaking, these facts pertain to the areas of (1) Visa's intent in passing and enforcing Bylaw 2.06; (2) the relevant geographic and product markets; (3) the effect on competition of Visa's decision not to grant Sears' application for membership; and (4) Visa's market power. Only after hearing all the evidence can the court determine whether facts remain in dispute which should be determined by a jury, as the finder-of-fact, or whether this case may be decided as a matter of law.

Visa, with considerable force of persuasion, asks the court to rule as a matter of law that because Sears appears to be a viable competitor in the credit card market Visa's actions in excluding Sears from membership cannot be in violation of Section One of the Sherman Act. This should be the result, Visa argues, despite Visa's intent in excluding Sears, irrespective of Visa's market power, and without regard to whether such an exclusion is anticompetitive or harmful to consumers. This the court cannot do. Visa seeks a policy interpretation of first impression in a case where virtually all of the traditional antitrust areas of inquiry are in dispute. There is no agreement as to Visa's relative market power; there are serious differences of opinion by the parties as to Visa's motives in passing Bylaw 2.06, and legal experts and economists retained by both sides disagree with one another over the effect on competition of Sears' exclusion.

As tempting as it may be for a trial judge to interpret the Sherman Act in the manner presented by Visa, or, for that matter, in the manner proposed by the movant in *Northwest Wholesale* (i.e. *Pacific Stationery* argued for a *per se* violation by the cooperative, much as Sears could have attempted to claim a *per se* illegal horizontal group boycott by Visa member banks in this case), the Court is not permitted such interpretive authority where there exist genuine disputes of fact that are traditionally recognized as material in rule-of-reason cases. The general language of Section One increases the temptation to make legal, as opposed to factual, conclusions, but it is the simplicity of the same language that compels this court to exercise restraint. Section One clearly prohibits "a combination, . . .in restraint of trade." In the case now before the court, we have a decision by the Visa board of directors to exclude Sears from Visa membership on any terms. That appears to constitute a combination among separate actors to restrain trade. Whether such a restraint is unreasonable and therefore in violation of the antitrust laws, or reasonable (i.e. procompetitive) and therefore not in violation of the antitrust laws, becomes the issue. *Reazin*, 899 F.2d at 960. In the absence of clear guidance from the United States Supreme Court or the Tenth Circuit Court of Appeals requiring the adoption of Visa's policy argument as the correct interpretation of what Congress intended when it passed the Sherman Act in 1890, this

Court is not in a position to grant Summary Judgment as a matter of law. The statute itself, and the interpretation of it, especially the Supreme Court's language in *Northwest Wholesale, Aspen Skiing Co.*, and most recently, *Eastman Kodak*, and the Tenth Circuit's analysis in *Reazin* lead the court to the opposite result. Sears is entitled on the present state of the record to a trial.

Visa's argument that Sears' Section One claim must fail unless it can be shown that Visa membership constitutes an "essential facility" for Sears' effective competition in the general credit card market is also not well taken. Notwithstanding Professor Areeda's considerable musings on the subject, (*see, e.g.*, Visa's Memorandum in Support of Summary Judgment at pp. 8, 9, 18, 20), there is no controlling precedent stating that absent an essential facilities case, a claim such as the one asserted by Sears in this case must necessarily fail. There is no attempt by Sears to describe this case as an essential facilities case. Sears simply asserts that given its view of Visa's market power in the relevant market (70% to 90% of the general credit card market in the United States), Visa must accept Sears as a Visa member or be in violation of Section One of the Sherman Act. The finding of an essential facility is not at issue in this case, and need not be.

Based on the foregoing, Sears' antitrust claim cannot at this point be decided on Summary Judgment. Therefore, Visa's Motion for Summary Judgment is denied.

II. *Sears' Motion for Summary Judgment on Visa's Antitrust Counterclaim*

Count II of Visa's Counterclaim against Sears is a cause of action based on Section Seven of the Clayton Act. 15 U.S.C. § 18 ("Section Seven"). Sears has moved for Summary Judgment on this claim, arguing that Visa's antitrust suit is prohibited by the Bank Merger Act. 12 U.S.C. § 1828.

Pursuant to the Bank Merger Act, proposed bank mergers must be investigated and approved by the Federal Deposit Insurance Corporation before the merger can take place. Such mergers, however, are granted special immunity from antitrust litigation. A merger which has been approved and consummated under the Bank

Merger Act "may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than [Section Two of the Sherman Act]." 12 U.S.C. § 1828(c)(7)(C).

The Bank Merger Act only grants protection from suits which challenge the merger "alone and of itself." *Id.* It does not prohibit suits which challenge more than the merger transaction. Suits which challenge conduct subsequent to the merger are allowed under the Act.

In the present case, Sears' acquisition of MountainWest was approved and consummated pursuant to the Bank Merger Act. Thus, Sears has brought this motion, arguing that the merger has immunity from antitrust litigation.

Visa argues that its Section Seven claim is not barred by the Act because it does not challenge the acquisition "alone and of itself." The counterclaim, it is argued, challenges more than Sears' initial acquisition of MountainWest—it also challenges Sears' post-acquisition conduct.

Sears responds by arguing that Visa's counterclaim cannot possibly challenge post-acquisition conduct, because no such cause of action is allowed under Section Seven. It asserts that Section Seven only allows suits which challenge the initial acquisition of stock.

Thus, the primary issue with respect to this motion is whether Section Seven is limited to suits challenging the initial acquisition of ownership, or whether it also allows for suits based on post-acquisition conduct. If Section Seven only allows suits which challenge the initial stock purchase, Visa's counterclaim is prohibited by the Bank Merger Act. If, however, Section Seven allows suits which challenge anticompetitive conduct after the initial merger, the counterclaim is proper and is not barred by the Act.

The relevant portion of Section Seven states:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the

> jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Visa cites to *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), and other cases[2] as support for its position that Section Seven allows for separate causes of action based on conduct occurring after the initial acquisition of ownership.

Sears maintains that Section Seven suits may not be based upon post-acquisition conduct. It concedes that such conduct may be relevant as *evidence* in determining the anticompetitive effects of a merger. However, Sears asserts, every Section Seven suit is ultimately a challenge to the stock acquisition itself. Sears argues that such an analysis is not inconsistent with *Du Pont* and the other cases cited by Visa. In each case, "the legality of the acquisition itself, rather than the conduct offered to support the challenge to that acquisition, was ultimately at issue." (Sears' Reply Memorandum in Support of Summary Judgment on Visa's Antitrust Counterclaims at p. 3).

The court has carefully reviewed *Du Pont* and the other cases cited by Visa. The court finds that *Du Pont*, standing alone, is inconclusive as to whether Section Seven provides for separate causes of action based on post-acquisition conduct. However, this issue was resolved by the Supreme Court in *United States v. ITT*

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[2] Specifically, Visa relies on *Mississippi River Corp. v. F.T.C.*, 454 F.2d 1083, 1088 (8th Cir.1972); *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1214 (9th Cir.1970), *cert. denied*, 401 U.S. 939, 91 S.Ct. 934, 28 L.Ed.2d 219 (1971); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F.Supp. 1199, 1224 (D.Haw. 1980), *aff'd*, 732 F.2d 1403 (9th Cir.1984); and, *Julius Nasso Concrete Corp. v. Dic Concrete Corp.*, 467 F.Supp. 1016, 1023 (S.D.N.Y.1979).

Continental Baking Co., 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975).

In *Continental Baking*, the Supreme Court identifies the type of suits which may be brought under Section Seven. It defines the word "acquisition" broadly, so as to allow for suits based not only upon the purchase of stock, but upon the subsequent holding and use of that stock.

In *Continental Baking* the government brought suit against a baking company for failure to comply with a consent order issued by the Federal Tax Commission. The order prohibited the company from "acquiring" other bakeries for a certain period of time. A dispute arose as to whether the word "acquiring" connotes a single or continuing violation. The Court was called upon to interpret the word. The Court stated:

> We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in § 7 of the Act means holding as well as obtaining assets . . . .[T]he framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets.

Id. at 240, 95 S.Ct. at 936. The Court then clarified its holding in *Du Pont*, using the case as support for its decision. It stated:

> Similarly, this Court's opinion in [*Du Pont*] rests upon the conclusion that "acquisition" can mean, and in the context of § 7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

Id. 420 U.S. at 241, 95 S.Ct. at 937. The Court continues:

> "[A]cquisition" under § 7 is not a discrete transaction but a *status* which continues until the transaction is undone.
>
> Thus, under the order . . ."acquiring" must mean both the act of first obtaining assets and the *retention* and *use* of those assets.

Id. at 242-43, 95 S.Ct. at 938 (emphasis added).

This language makes it clear that the word "acquisition" encompasses more than the initial stock purchase. A Section Seven suit may challenge the acquisition, holding, and/or use of stock. It is not limited to suits against acquisitions.

In the present case, Visa's counterclaim challenges more than Sears' initial acquisition. It also challenges Sears' continued ownership of MountainWest. It attacks the way Sears has used (and intends to use) MountainWest as a means of participating in the Visa credit card program. This "holding" and "use" of MountainWest, it is alleged, constitutes a violation of Section Seven.

The Bank Merger Act does not prohibit Visa's counterclaim. The counterclaim does not challenge the merger transaction alone and of itself, and is therefore not barred by the Act. Accordingly, Sears' Motion for Summary Judgment on Visa's Antitrust Counterclaim is denied.

III. *Sears' Motion for Summary Judgment on Visa's Non-Antitrust Counterclaims*

Summary Judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is the movant's burden to demonstrate the absence of a genuine issue of a material fact and to show that it is entitled to judgment as a matter of law. Sears bears this burden as it has moved the court for Summary Judgment on Visa's non-antitrust counterclaims of fraud, trademark infringement and breach of contract.

Sears attempts to subject Visa to Summary Judgment on its fraud claim by asserting that Visa has failed to establish essential elements of the claim. In order to prevail on a claim for fraud, Visa must establish four separate elements: (1) that the relationship between the parties was such that Sears owed a duty of disclosure to Visa, or that MountainWest made a false affirmative statement; (2) that the misrepresentation was made with knowledge of its falsity; (3) that Visa reasonably relied on the misrepresentation; and (4) that

damages resulted from the misrepresentation. If even one element is not established, the claim for fraud cannot proceed.

Whether a duty to disclose existed between the parties is a disputed issue. A duty to disclose will be imposed where a fiduciary relationship exists between two parties *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). Visa suggests that a fiduciary relationship exists between joint venturers, *Lynch v. MacDonald*, 12 Utah 2d 427, 367 P.2d 464, 468 (1962), but the Visa enterprise has not been definitively categorized as a joint venture. In *National Bancard Corp. v. VISA USA*, 779 F.2d 592, 601-602 (11th Cir.) *cert. denied*, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986), for example, the court stated that "Visa exhibits characteristics of a joint venture, even if it is not technically a joint venture." The association between Visa and MountainWest remains disputed and thus so does the question of whether a duty to disclose existed.

Regardless of the classification of the relationship, however, Visa has alleged that a false affirmative statement was made in a membership agreement in which MountainWest stated that it was in compliance with Visa's requirements for membership, including Bylaw 2.06. Visa cites a statement made by Mr. Phillip Ware, who handles all day-to-day operations for MountainWest. Visa claims that Mr. Ware indicated to Visa that the relationship between MountainWest and Sears was "remote". Based on the fact that MountainWest is a subsidiary of Sears, that statement could provide sufficient basis for the first element necessary for Visa's fraud claim.

> The rule has long been settled . . .that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure."

Lacher v. Superior Court, 230 Cal.App.3d 1038, 1046-47, 281 Cal.Rptr. 640, 643 (1991) (quoting *Rogers v. Warden*, 20 Cal.2d 286, 289, 125 P.2d 7, 9 (1942)).

Visa must also show that the alleged misrepresentation was made with knowledge of its falsity. There is enough evidence in the record to establish at least a genuine issue of material fact in regard to this element of the fraud claim. Sears attempts to justify MountainWest's statement on its membership application that it was in compliance with all of Visa's operating regulations by stating that it was MountainWest's "legal position" that Bylaw 2.06 was invalid and did not apply to Sears. However, the question on the application did not ask whether or not MountainWest believed Visa's bylaws and regulations were valid, it simply asked whether MountainWest complied with Visa's membership requirements. MountainWest knew the provisions of Bylaw 2.06 and knew that its affiliation with Sears was contrary to the bylaw. MountainWest's "legal position" defense does not definitively establish that the misrepresentation was made without knowledge of its falsity.

Additionally, when Visa was asked to approve the credit card design for 1.5 million Prime Option MountainWest Visa cards, Sears instructed Datacard, the credit card printer, to inform Visa that the identification of Discover Card Services as the orderer had been due to Datacard's mistake. These factors combine to effectively establish that there is a question whether MountainWest knew that it was misrepresenting information to Visa.

Visa must also establish that its reliance on MountainWest's statement was reasonable in order to prevail on its fraud claim. *Cheever v. Schramm*, 577 P.2d 951, 954 (Utah 1978). Sears argues that Visa should have known of the affiliation between Sears and MountainWest because it was published in a number of industry publications and was known by several prominent Utahns.

Sears argues that Visa had a duty to inquire into MountainWest's affiliation with Sears; however, Visa could hardly have inquired into the affiliation when Visa did not know what facts were being withheld. Visa relies on the party submitting the application to make full and candid disclosure. In *Elder v. Clawson*, 14 Utah 2d 379, 384 P.2d 802, 805 (1963), the court stated that a duty to disclose may arise in the narrow circumstances where one party to a contemplated business transaction has knowledge "which is not within the fair and reasonable reach of the other party and

which he could not discover by the exercise of reasonable diligence," particularly where "the other party relies on him to communicate to him the true state of facts to enable him to judge the expediency of the bargain." Conversely, however, Sears argues that Visa "may not lay its failure to protect its own interests at the defendant's feet in the form of an allegation of fraud." *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1374 (Utah 1980). The reasonableness of Visa's reliance remains a genuine issue of material fact.

The last element of a claim for fraud is damages. Visa must establish that it sustained damages by reason of the alleged misrepresentation or non-disclosure. *Dilworth v. Lauritzen*, 18 Utah 2d 386, 424 P.2d 136, 138 (1967). Visa has established sufficient evidence to allow this claim to proceed. Although the alleged damages are negligible, they are damages sustained as a result of the alleged fraud. Mr. Steven Vondale, who reviewed the Prime Option Order submitted by Datacard, would not have had to research the order at all if MountainWest had acted candidly with Visa. "While the amount of damage need not be determined with mathematical precision, it must be supported by the evidence in the record." *Vaughn v. Gen. Foods Corp.*, 797 F.2d 1403, 1416 (7th Cir.1986), *cert. denied*, 479 U.S. 1087, 107 S.Ct. 1293, 94 L.Ed.2d 149 (1987). Summary Judgment is not appropriate for the fraud claim. Visa has brought forth sufficient evidence to establish genuine questions of material fact in regard to each element of the claim.

Visa's claim for trademark infringement is founded upon the provisions of the Lanham Act. 15 U.S.C. § 1114. Visa states that Sears has infringed on Visa's marks within the meaning of the Act because Visa never licensed Sears to issue Visa cards and, in fact, expressly prohibited Sears from issuing the cards.

Sears argues that a trademark infringement claim cannot proceed because the Visa cards issued by MountainWest were genuine and Visa expressly consented to allow MountainWest to continue servicing its pre-existing Visa card accounts. A basic principle of trademark law is that there can be no liability for trademark infringement when the trademark owner consents to use of the mark.

Sears cites numerous occasions when Visa's attitude has been permissive in allowing other Sears affiliates to participate in the Visa

program. Sears states that because Visa consented to the continuation of MountainWest's Visa card program throughout the time period relevant to the pendency of this lawsuit, Visa's trademark infringement claim fails as a matter of law. Visa responds by stating that Sears knowingly "used Visa's trademark after the expiration of a trademark license, and before the issuance of any valid new one. Sears' acquisition of MountainWest Savings terminated any authority MountainWest had to issue Visa cards." (Visa's Memorandum in Opposition to Motion for Summary Judgment on Visa's Non-antitrust Counterclaims at p. 32). Visa also cites *Lone Mountain Prod. Co. v. Natural Gas Pipeline Co.*, 710 F.Supp. 305, 311 (D. Utah 1989), for the proposition that "the fact that party has not enforced a provision in another contract on a previous occasion does not grant the other party a license to ignore that provision in a subsequent contract."

To be entitled to damages for trademark infringement, Visa bears the burden of establishing either that Visa has lost business and profits as a result of Sears' alleged infringement, or that Sears has shown an egregious display of bad faith in infringing on Visa's mark. *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 917, 919 (Fed. Cir.1984).

Although actual damages may not be readily provable, Visa may be able to show bad faith on the part of Sears. Proof of actual damages is unnecessary to support a trademark claim where the infringer has acted in bad faith. *See Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204 (7th Cir.1990). Sears argues that Visa's consent to allow MountainWest to continue servicing its nearly 6,300 Visa cardholders defeats any claim that Visa may have for trademark infringement. Visa claims that the acquisition of MountainWest by Sears was a result of fraud and as a result of that fraud, MountainWest's license to issue Visa cards should be revoked. While Visa's consent may seem to undermine its claim for trademark infringement, it may still prevail if bad faith is shown. There is at least a triable issue as to whether Sears wilfully deceived Visa after it learned that Visa would not admit Sears to membership.

Furthermore, the resolution of the legality of Bylaw 2.06 is critical to the determination of the trademark infringement claim. If the bylaw is valid, then Sear's continued distribution of Visa cards

after the acquisition of MountainWest constitutes trademark infringement. However, if the bylaw is invalid, there is no basis for a claim of trademark infringement. A company authorized to issue Visa cards was doing precisely that. The determination of the trademark infringement claim is contingent upon the resolution of Bylaw 2.06 and thus, Summary Judgment is inappropriate at this time.

Visa's claim for breach of contract is similarly unsuited for Summary Judgment. Sears states that "based on the Court's opinion earlier this year, the only remaining issue before this Court is whether Bylaw 2.06 is valid under the antitrust laws." This statement only begs the question as to the validity of Bylaw 2.06 and necessarily precludes Summary Judgment until validity of the bylaw is resolved.

There is sufficient evidence in the record to allow Visa's non-antitrust counterclaims to proceed to trial, accordingly Sears' Motion for Summary Judgment on the non-antitrust counterclaims is denied.

IV. *Sears' Motion to Bifurcate the Antitrust Issues and the Non-Antitrust Issues*

Sears has moved to bifurcate the trial of the antitrust issues and the non-antitrust issues. In deciding whether to bifurcate the trial, the court has broad discretion. As stated in *Eastridge Dev. Co. v. Halpert Assocs.*, 853 F.2d 772, 781 (10th Cir.1988):

> The Federal Rules of Civil Procedure give district courts broad discretion in deciding whether to sever issues for trail and the exercise of that discretion will be set aside only if clearly abused.

(quoting *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir.1985), *cert. denied*, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986)).

In using its discretion the court is guided by Federal Rule of Civil Procedure 42(b):

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of

> any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

The controlling considerations in Rule 42(b) are economy and avoiding prejudice. In light of these considerations the court hereby bifurcates this case into two proceedings.

The first proceeding will address only the issue of antitrust liability. More specifically, the first proceeding will determine liability under Sears' Section One Sherman Act claim, and Visa's Section Seven Clayton Act counterclaim. The second proceeding will determine antitrust damages, if necessary, and fully adjudicate all other claims and counterclaims. Whether both proceedings will use the same jury will be decided after consultation with counsel at or before the final pre-trial conference.

Bifurcation will increase trial efficiency. There may be no need to hold the second proceeding. Even if there is a second proceeding the number of issues involved may be reduced by the outcome of the first proceeding. Finally, because some evidence pertinent to the non-antitrust counterclaims, particularly those dealing with fraud and bad faith, probably will not be relevant to the antitrust dispute, the first proceeding may be shorter than originally anticipated.

Bifurcation will also avoid the possibility of unfair prejudice to either party. Visa has alleged several counterclaims which could prejudice or confuse the outcome of the antitrust dispute. Visa has alleged fraudulent activity by both Sears and its counsel. Visa is seeking to compel evidence from Sears' counsel to further investigate the fraud charges. Sears argues that its counsel may need to be called as witnesses to defend against the fraud charges. Calling trial counsel could have a prejudicial effect on the antitrust trial. Even if the attorneys were not called, allowing Visa's fraud claims in the same action as the antitrust claims could undermine the focus of the trier-of-fact on the important antitrust issues raised in this action.

Visa has also alleged unfair trade practices and trademark infringement. Visa will support these allegations by attempting to

show Sears' bad faith and improper conduct. As discussed above, this type of evidence could prejudice or confuse the trial of the antitrust issues.

From the outset this case has focused on the antitrust dispute. Visa's non-antitrust counterclaims will raise arguments and introduce evidence which could hinder a fair trial of the antitrust issues. By bifurcating the trial the court will insure a fair, unprejudiced decision on the merits of the antitrust dispute without the complications and confusion which could arise from the other claims and counterclaims. Given the importance of the antitrust dispute the court believes it is essential to bifurcate; providing a clear, uncluttered decision in the first proceeding, addressing only antitrust liability.

V. *Both Parties' Motions to Compel Discovery and Sears' Motion to Quash Subpoena*

Visa's Motion to Compel Discovery, Sears' Motion to Compel Discovery, and Sears' Motion to Quash the Subpoena sent to Kirkland & Ellis concern discovery disputes relating to Visa's non-antitrust counterclaims. In light of the court's ruling on the Motion to Bifurcate, the court finds that it is premature to rule on these motions at this time. The court reserves ruling on these motions until a trial date and scheduling order on the non-antitrust counterclaims has been established after consultation with counsel for the parties.

CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED

1) Visa's Motion for Summary Judgment is DENIED.

2) Sears' Motion for Summary Judgement on Visa's antitrust counterclaim is DENIED.

3) Sears' Motion for Summary Judgment on Visa's non-antitrust counterclaims is DENIED.

4) Sears' Motion to Bifurcate the trial of the antitrust and non-antitrust issues is GRANTED insofar as the first proceeding will determine liability on the antitrust issues, and the second proceeding

will determine damages, if necessary, and the non-antitrust claims and counterclaims.

5) Visa's Motion to Compel Discovery, Sears' Motion to Compel Discovery and Sears' Motion to Quash Subpoena are continued pending further consultation with counsel.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCFC ILC, INC., doing business as MountainWest Financial, Inc., *Plaintiff-Counter-Defendant-Appellee*, v. VISA USA, INC., *Defendant-Counter-Claimant-Appellant*.	No. 93-4105

ORDER
Entered December 5, 1994

Before MOORE, SETH, Circuit Judges, and DAUGHTERY*, District Judge.

* The Honorable Frederick A. Daugherty, United States District Judge for the Western District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By: L. Balzano, Deputy Clerk

(2)

Supreme Court, U.S.
FILED
MAY 18 1995
CLERK

No. 94-1719

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

v.

VISA USA INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PARTIES TO THE PROCEEDING

Respondent VISA USA Inc. is a joint venture membership corporation. The petitioner is properly identified in the Petition for Writ of Certiorari.

RULE 29.1 LISTING

Pursuant to Rule 29.1, respondent VISA USA Inc. discloses that it does not have subsidiaries or affiliates that have issued shares to the public.

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No. 94-1719

In the Supreme Court

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OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

v.

VISA USA INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent VISA USA Inc. ("VISA") opposes MountainWest Financial Corporation's ("Dean Witter's") Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISION INVOLVED

The petition properly identifies the opinions below, the basis for the district court's and the court of appeals' jurisdiction, as well as Dean Witter's basis for invoking this Court's jurisdiction. The petition also sets forth the text of the relevant statute.

INTRODUCTION

Dean Witter asserts that this is a "landmark" case. Its own petition demonstrates otherwise. To be sure, the payment card industry is important and large damages are claimed. But those are not grounds for review and there is nothing exceptional about the court of appeals' decision in this case. It applied familiar legal principles and simply held that, on the record presented, petitioner failed to prove any cognizable harm to competition.

Faced with that unexceptional holding, petitioner labors to construct supposed "conflicts" among the circuits (three-way no less) on the issues of (a) ancillarity and (b) market power. But to do so it must materially contort the decision below, including the legal principles and factual record on which it was based. Moreover, it elevates differences of judicial expression into fundamental jurisprudential disputes that none of the supposedly "conflicting" cases even recognize, let alone deem of great moment. It is surely telling that the "conflicts" claimed by petitioner not only were unnoticed by the Tenth Circuit, but were not even called to its attention by Dean Witter.

This is an easy case, both factually and legally. The issuance of general purpose charge cards is one of the most remarkably diffuse and competitive lines of business in American commerce. That fact was demonstrated, without dispute, at trial by evidence of the market's virtually "atomistic" character, the near total absence of barriers to entry, and consistent growth in both output and new card programs. App. 16a. Given that market structure, it was scarcely surprising that petitioner offered no evidence of supracompetitive profits or other competitive failure.

Instead, Dean Witter demanded access to VISA's trademarks and goodwill so that it could follow a preferred "branding strategy" (its term) and avoid "cannibalizing" (ditto) its own Discover card by offering both a proprietary card (Discover) and a further brand of VISA. In short, it demanded judicially compelled access to VISA's property (to wit, a compulsory trademark license) without any proof of monopolization, "essentiality," market failure, or even its inability to be an effective competitor in the market.

Such a claim utterly confounds the most fundamental notions of protecting private property and encouraging investment in innovation and entrepreneurial risk-taking upon which that precept rests. It is small wonder, therefore, that the Tenth Circuit had no difficulty rejecting Dean Witter's claims as a matter of law, that not a single judge of that court voted to grant rehearing, and that even the district judge (although feeling constrained to honor the jury's decision) observed that "I would have hung the jury before I would have come back with that verdict." R. at 1592.[1]

COUNTER-STATEMENT OF THE CASE

VISA and Issuer Competition

VISA is a joint venture membership corporation. Its basic structure and operation remain largely unchanged from its early days when it pioneered development of the general purpose charge card.[2] It operates pursuant to a system of rules that govern its interdependent financial exchange network. It is responsible for providing the systems and processes through which millions of VISA transactions are approved, cleared and settled between members every day. R. at 423-34, 1408.

VISA, itself, does not issue cards or contract with merchants. Nor does it limit the finance rates, annual fees or other terms on

---

[1] Or, as he put it in denying plaintiff's post-trial request for an injunction:

> To this moment I don't see how a company the size of Sears Roebuck [Dean Witter's parent at the time of trial] has to resort to our antitrust laws to obtain the property of a joint venture, or a single company or anyone else, when they have shown their ability, impressively so, to be successful and viable and very profitable in this very arena. (R. at 1592).

[2] For a description of the growth of general purpose charge cards, see D. Baker & R. Brandel, *The Law of Electronic Fund Transfer Systems* ¶¶ 1.02[3], 23.02[1] (2d ed. 1988) (*"EFT"*); *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1236-37 (S.D. Fla. 1984), *aff'd*, 779 F.2d 59 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

which cards are offered. It also does not restrict output or the geographic areas in which members compete to issue cards or sign merchants. R. at 433-35; App. 4a, 15a. As a result, in literally every area of the country numerous banks compete to solicit new cardholders and merchants on a wide variety of terms. Overall, VISA today has approximately 6,000 issuer-members with the top 10 issuers accounting for approximately 50% of its total volume. App. 16a. However, even the smallest bank can offer its customers the full range of VISA services. R. at 877-83, 915-29.

Banks compete for cardholders in numerous ways: some advertise heavily; others solicit only their regular banking customers. Some charge relatively higher prices in return for greater service or add-ons, such as extended product warranties, or credit towards free airline tickets or other products, ranging from small household appliances to a new car. Some offer very low interest rates by strictly controlling credit standards; others are more generous in their credit evaluation and must charge higher rates as a consequence; still others offer programs that support charitable, cultural or educational institutions. R. at 859-60, 864-79, 1458-59, 1461-64.

VISA membership originally was open only to traditional commercial banks. However, over the years, membership eligibility has been expanded to include savings and loans, thrifts, credit unions and, most recently, even the banking affiliates of industrial corporations such as Ford Motor Company, General Electric, and ITT. R. at 1503. In fact, with the exception of its two major intersystem competitors (Discover and American Express), VISA membership is open to any financial institution that is eligible for federal deposit insurance. R. at 1400-03. In addition, numerous non-member industrial companies participate in the business through so-called "affinity" partnerships with member banks. Many of the largest new VISA and MasterCard programs, such as the AT&T Universal Card and the Shell/Chemical Bank Card, are examples of such programs.

Intersystem (or Interbrand) Competition

While card issuance is the focus of Dean Witter's claims, it does not reflect the full nature of competition in the general

purpose charge card market. VISA also competes at the brand level against its system rivals (principally American Express and Discover), and *vice versa*. This competition between different card brands or systems — *intersystem* competition — is equally important. Certain important functions are (and must be) carried out at the system level. Thus, as noted, VISA has established a number of sophisticated computer and communication mechanisms that are responsible for controlling the approval, clearing and settlement of transactions. Each of the other interbrand competitors operates similar systems and there has been substantial technological competition over the years to create greater efficiency at the intersystem level by such things as improving the approval and settlement process in order to limit fraud and bad debt losses and to increase customer convenience.

Intersystem competition also takes the obvious form of direct brand-level promotion, such as VISA's well-known sponsorship of the Olympics and its ubiquitous "and they don't take American Express" advertising campaign. R. at 432-33. Equally important, vast amounts of money are invested by members, both at the systems and bank institution level, to promote the VISA brand and enhance the efficient operation of the service for consumers.

Unlike the thousands of competing issuers, there has never been more than a handful of systems competitors. Moreover, there is a nearly complete overlap in ownership between VISA and its early intersystem rival, MasterCharge (now MasterCard).[3] While new system-level entry is possible, as Discover itself attests, there is considerable doubt that others will consider it prudent, given the costs involved and the emerging potential of home computers to effect consumer financial transactions.

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[3]That overlap has been broadly criticized. *See, e.g., EFT* ¶ 23.02[3]; Constantine, Presentation (Dec. 6, 1990), in *Economists' Perspectives on Antitrust Today: Antitrust Issues in Regulated Industries* (C. River Assocs. eds., 1991) (R. at 1613); Balto, *Access Demands to Payment Systems Joint Ventures*, 18 Harv. J.L. & Pub. Pol'y 636, 638-40 (forthcoming June 1995). For a history of the subject, see *EFT* ¶¶ 23.02[2]-[3].

Discover

In 1986, Sears, Roebuck & Company and its Dean Witter subsidiary entered the market with Discover. Before doing so, Dean Witter conducted an elaborate analysis of the economics of the general purpose charge card industry. R. at 313-14. A high-level task force was appointed to consider two alternatives: become a major issuer of VISA or MasterCard or, alternatively, enter the business with a new, wholly-owned proprietary card. R. at 366-74. The study showed that membership in VISA or MasterCard offered certain advantages and was less economically risky. R. at 536-50, 1325-26. Those advantages, however, were perceived to be outweighed by the significant disadvantages of being just one more VISA (or MasterCard) member, with no ultimate control over product configuration and identity or over business and marketing strategies. R. at 536-50, 1327-28. Thus, the task force recommended that Dean Witter follow what it termed the "high reward/high risk" strategy of going into active competition with the two bankcard joint ventures through a new wholly-owned product. R. at 542-50, 1327.

Discover was launched in early 1986 with a massive promotional campaign, offering a no-fee card and a rebate of up to 1%. R. at 322-24.[4] The new brand came complete with its own authorization, clearing and other systems that were comparable to those of VISA, MasterCard and American Express.[5]

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[4]Whatever the appeal of these features as a consumer "come on," they scarcely qualified the product as "low price" when its high interest rate and deceptively expensive method of computing finance charges were taken into account — a fact the district court was at pains to note. *See* App. 70a & n.30.

[5]Dean Witter's decision to go "head to head" in competition with VISA understandably was not welcome. VISA urged its members to avoid helping Discover and (for a short time) denied Discover access to VISA-owned terminals in some merchant locations, thereby requiring Discover to compete by creating its own terminals, which it did. *See* App. 31a. Both at trial and, again, here (Petition ("Pet.") 5-6) Dean Witter has portrayed this "anti-Discover" campaign as purported evidence of anticompetitive conduct by VISA. But absent any claim that

After substantial early losses, Discover became very successful.[6] R. at 325-26, 379-80, 386-87, 1586. Within five years of its introduction, it had become the second largest issuer of general purpose charge cards in the United States, with over 20 million card accounts. R. at 533-35, 885-86, 888-90. By the time of trial it had signed over 1.5 million merchants to accept its card, including virtually every major merchant in the country. R. at 379-82, 533-35, 791. With system volume of over $14 billion and net profits of $170 million, Discover was a major contributor to Sears' overall profitability. R. at 311, 325-28, 1585-86. In fact, according to documents produced on the eve of trial, the value of Discover as a stand-alone business was assessed at approximately two billion dollars by Sears' investment bankers. R. at 403-04.

Dean Witter's Efforts to Become a VISA Member

In 1989, Greenwood Trust Co., the issuer of the Discover card and a Sears, Roebuck & Company subsidiary,[7] applied to become a VISA member. VISA rejected the application because it believed that it was inconsistent with the interests of the joint venture to admit a direct intersystem competitor. At the same time, the Board adopted By-Law 2.06 which, by its terms, prohibits membership in VISA by existing system competitors,

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VISA's activities were deceptive or otherwise unfair, they reflect nothing more than "vigorous competition," which the antitrust laws encourage. *Cf. Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("Competition is a ruthless process. . . . The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds.").

[6] Its success was not always certain. In fact, based on some early press reports, VISA's management believed that Discover's start-up costs were so great that it might seek to convert its program into VISA. VISA's willingness to explore that possibility is documented in the testimony of VISA's former CEO, Charles Russell. R. at M745-46.

[7] Sears recently spun off its Dean Witter subsidiary which has since been renamed Dean Witter, Discover & Co.

specifically Discover and American Express.[8] The by-law provides:

> [I]f permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors . . . .

At the time Greenwood Trust applied for membership, Dean Witter had no plans to initiate a VISA card program. Rather, as discovery in the subsequent litigation showed, its purposes were to blunt intersystem competition by VISA against Discover and to obtain information about VISA's operations and plans. R. at 387-89, 1346.

In 1990, Dean Witter decided that it did want to issue a VISA (or MasterCard). Rather than approach the matter directly, Dean Witter purchased the assets (including a VISA membership) of a failed Utah thrift from the Resolution Trust Corporation and, without notice to VISA, set about to use that membership to launch its proposed new VISA card program. VISA fortuitously discovered those plans and thwarted them. Dean Witter promptly filed the present lawsuit and obtained a preliminary injunction to allow it to proceed with its planned new program. The Tenth Circuit equally promptly stayed and subsequently vacated that injunction. *See* 936 F.2d 1096 (10th Cir. 1991).

The Trial

Dean Witter asserted at trial that VISA's refusal to permit it to become a member precluded it from pursuing a preferred "brand-

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[8]Dean Witter argues that a recital about preserving intersystem competition in the resolution that accompanied adoption of the new by-law is disingenuous, since the VISA Board surely did not act out of any such selfless motive. But the concern expressed was not for preserving Dean Witter's competition; it was about the unfairness to intersystem competition *against* VISA's members if Dean Witter was allowed to have the benefits of a proprietary card as well as a VISA membership. R. at 475-78.

ing" strategy of offering both a Discover card and a VISA card to consumers. R. at 306-07, 309. It further asserted that its new Prime Option card would be attractive to consumers because of its supposedly low interest rate and other features. *Id.* Dean Witter did not claim, however, that it possessed any unique abilities as a card issuer. Nor did it claim that it was unable to compete successfully without access to the VISA name and systems or that it was prevented from offering Prime Option on its own with all of the same features (except, of course, the VISA name), either as a new proprietary card or as an additional brand of Discover. Rather, it claimed that, as a proprietary card, it could not "reach" those potential customers who preferred a bank card. Hence, it asserted that it could be a more "effective" competitor if it could *also* issue its competitor's brand. According to its expert economist, James Kearl of Brigham Young University, VISA's refusal to let it become a member unreasonably restrained trade, given the aggregate market share of VISA's members.

VISA's defense rested in part on the undisputed evidence concerning market structure, which negated any claim that competition was harmed by its membership rules. VISA's By-Law 2.06 excluded only two firms (Dean Witter and American Express) from access to the VISA *brand*, not from the general purpose charge card market, which has consistently grown both in output and new issuers. By contrast to the competition among issuers, undisputed evidence showed that competition at the systems level was significantly limited. Allowing Dean Witter to issue a VISA card would compromise that intersystem competition by increasing the opportunities for collusion and strategic coordination, notwithstanding Dean Witter's claim that it still intended to compete vigorously with Discover.

VISA's expert, Richard Schmalensee, a professor at MIT and a member of President Bush's Council of Economic Advisors, testified about the importance of preserving incentives for both joint ventures and single firms to innovate — testimony which was not substantially contested. R. at 947-50; *compare* R. at 829-33. Dr. Schmalensee testified that, for the same reasons courts do not oblige single firms to share the fruits of their investment in

entrepreneurial innovation short of monopolization or control of an "essential facility," it is inappropriate to require such sharing by efficiency-creating joint ventures. To do otherwise would make joint ventures less competitively attractive than single firms or complete integration through merger, even though partial integration is often the most efficient means of achieving economies of scale and scope. R. at 948-49.

Dean Witter also advanced two other themes at trial. The first — repeated no fewer than six times in its present petition[9] — is that VISA discriminated against it by allowing Citicorp's Diners Club to remain a member while it (and American Express) were excluded. But aside from the fact that the Sherman Act is not a civil rights statute,[10] the evidence showed that VISA's members viewed Diners as a mere corporate niche product with nearly 20% of its business attributable to a single account (since lost) with the United States government.[11] Moreover, VISA viewed it as a stagnant, if not failing, product. R. at 634-35. Thus, other than as a "fairness" theme (which, of course, was how Dean Witter played the issue to the jury), VISA's failure to deem Diners a competitive card proved nothing.[12]

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[9] Its technique in this regard is not new. The fact that the meeting at which VISA adopted By-Law 2.06 took place in *Cannes, France* was mentioned to the jury 61 times during the trial.

[10] *See Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 252 (7th Cir. 1994) ("the Sherman Act is not a precursor to the Civil Rights Act of 1964").

[11] Diners Club is solely a non-credit card targeted at business travelers. The fact that there is some overlap with VISA's cardmember base does not distinguish Diners from numerous other proprietary and local card programs (ATM and point-of-sale principally) that overlap in a similar fashion but are scarcely considered "competitive" with VISA.

[12] The implicit assertion of the argument is that Dean Witter was singled out for exclusion because it allegedly would have offered a "low-priced" VISA card. But that argument fails to take account of the fact that the prices of VISA's 6,000 other issuers were not controlled in any way, and that numerous large and equally low-cost new VISA programs have come into the system in recent years.

Second, Dean Witter asserted that VISA's by-laws were anticompetitive for the independent reason that they created a "disincentive" for other firms, including existing VISA members, to develop new charge card systems in competition with VISA. The claim was presented as pure theory by Dean Witter's expert without evidence that any VISA member actually considered going into systems competition with VISA, let alone desisted from doing so because of its by-laws. Not only was the claim hopelessly speculative, as the Tenth Circuit concluded (*see* App. 19a n.14), but Dean Witter lacked standing to raise it since it would have been helped — not harmed — by any such "disincentive" effect. Nonetheless, the district court allowed the claim to go to the jury which rendered a general verdict in Dean Witter's favor. The general verdict format makes it impossible to determine what factual determinations the jury made, and on which theory.

Post-Trial Proceedings

Following the jury's verdict, VISA moved for judgment as a matter of law under Rule 50 or, in the alternative, for a new trial under Rule 59. Contemporaneously, the parties briefed VISA's Section 7 counterclaim that had been tried to the court. On April 1, 1993, the court denied VISA's motions and entered judgment against VISA on its counterclaim.

The court stated that, in its view, VISA's arguments were sound, both as a matter of antitrust policy and on the evidence presented. App. 69a-71a. The court noted that VISA's concern with the need to protect incentives for innovation by joint ventures not only raised "legitimate policy considerations" but was "logical and well reasoned." App. 60a; *see also id.* at 66a-67a. Specifically,

> [t]he court found Visa's policy and economic arguments to be the more compelling .... [T]he court found persuasive Visa's positions regarding the need to protect joint venture innovation, the importance of protecting private property, and the economic and competitive consequences of keeping the owner of the Discover Card out of the Visa system.

Id. at 71a. Similarly,

> the court acknowledge[d] that its view of the evidence differs from the jury's findings .... In fact, the court would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out.
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> ....
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> ... [T]he court believes that Bylaw 2.06 fosters intersystem competition in the relevant market ... [and that] [s]uch competition is important ... with only five active intersystem competitors .... Simply adding another high-priced card issuer, as Sears has always been ... may provide short-term intrasystem competitive benefits within the Visa system, but in the long run ... the damages from such inclusion will outstrip the benefits.

Id. at 69a-70a.

Despite these views, the court held that VISA's policy arguments were beyond its power to implement and that the jury's verdict was not so unreasonable that it should be set aside as a matter of law. App. 70a. The court, as finder of fact on VISA's Section 7 claim, similarly favored VISA but held that the asserted harm to competition resulting from Dean Witter's proposed partial acquisition was not great enough to justify an injunction. App. 96a.

The Court of Appeals Opinion

The Tenth Circuit reversed the district court's Sherman Act decision on the ground that the record failed to demonstrate (a) that VISA possessed market power in the issuance of general purpose charge cards, (b) that there was any harm to competition in that market, or (c) that Dean Witter had proven the kind of "extraordinary" facts that would trigger a compelled duty for VISA to share its property with its competitors. App. 19a, 25a.

Given those conclusions, Dean Witter's claim reduced simply to a concern for advancement of its own strategic objectives. And, as the court observed, "a producer's loss is no concern of the

antitrust laws, which protect consumers from suppliers rather than suppliers from each other." App. 25a (citing *Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)).[13]

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NEITHER CONFLICT NOR ERROR IN THE TENTH CIRCUIT'S ANALYSIS OF VISA'S MEMBERSHIP RULES.

Petitioner initially seeks *certiorari* on the ground that the Tenth Circuit's decision is in "conflict[ ] with other circuits" because it "validat[es] as ancillary a joint venture's counter-efficient and hence naked restraint of trade." Pet. 13. That assertion is wrong.

A. There Is No Conflict.

Dean Witter's claimed conflict in the circuits on the issue of ancillary restraints is transparently contrived. The fundamental tension in the law which Dean Witter says necessitates urgent resolution by this Court went utterly unnoticed by the Tenth Circuit. That is not surprising since Dean Witter invited no debate over the issue in that court. In fact, virtually none of the cases relied on by Dean Witter in its petition were even cited, let alone discussed, in its brief in the court below. Of the eight court of appeals cases cited in the "ancillary restraint" section of the petition, five were not mentioned at all.[14] Of the remaining three,

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[13] Having rejected plaintiff's Sherman Act claim as a matter of law, the court had no reason to consider the trial court's disposition of VISA's Clayton Act counterclaim. App. 26a.

[14] *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert denied*, 469 U.S. 990 (1984); *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co. — East*, 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2973 (1977); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir.

Rothery[15] and *Premier Electrical*[16] were cited in passing and for entirely unrelated propositions. The final case, *NASL*,[17] was discussed substantively, but its only claimed relevance in the pending petition concerns the question of "less restrictive alternatives" — a matter not materially addressed in the Tenth Circuit. Equally telling, with the exception of an unrelated citation of *Rothery*, none of the cases relied on here was cited in Dean Witter's request to the Tenth Circuit for *en banc* review.

Moreover, none of the opinions cited by Dean Witter perceived a conflict in the law, and for good reason. Like many doctrines that establish a generalized framework for analysis, the concept of ancillary restraints is expressed in different words by different courts within, as well as among, the various circuits. In fact, the Tenth Circuit's decision quoted two different formulations of the rule. App. 21a. Such nuances of expression do not create a conflict. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (conflict must be "real and embarrassing"); *see also Powell v. Nevada*, 114 S. Ct. 1280, 1285 (1994) (Thomas, J., dissenting); *Wilkerson v. McCarthy*, 336 U.S. 53, 66-67 (1949) (Frankfurter, J., concurring).

Dean Witter's further assertion that the Tenth Circuit failed to understand the law as explained in *Rothery* (and applied in *Premier Electrical*) is equally misguided. Contrary to the petition, it is hardly a "naked" restraint of trade for venturers to decide

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1975). One additional case, *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995), cited on the "less restrictive alternative" issue, was decided after briefing in the main appeal but before Dean Witter's Tenth Circuit petition for *en banc* review. It was not cited in that petition, but was mentioned in a footnote in one of the *amicus* briefs filed on Dean Witter's behalf.

[15] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

[16] *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987).

[17] *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

that they alone will be partners, or that they are going to keep the fruits of their success for themselves.

B. Efficient Joint Venture Membership Rules.

1. The "ancillary restraint" doctrine comes from Justice Taft's opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). It captures the important — though hardly obscure — notion that in order to get the benefits of integration parties may need to limit competition among themselves in certain respects. Such agreements are lawful when part of an integration even if they would be illegal if made apart from it.

Agreements among joint venture participants to limit territories or establish prices are examples of "ancillary" agreements which may limit competition that otherwise would exist *between venture members*. To determine whether such agreements are lawful courts ask whether the limitation removes more competition between the venturers than is reasonably necessary for the legitimate goals of their venture. By contrast, there is no elimination of competition between venturers to be tested for ancillarity when members merely decide not to share the venture's property with outsiders. Accordingly, cases considering compulsory admission to joint ventures typically do not focus on the ancillary restraint doctrine at all.[18] But whether phrased in terms of ancillary restraint principles or not, the relevant issue is whether a firm or group of firms is obliged to share the fruits of their investment in risk-taking and innovation with others. Absent such a duty, no antitrust issue is presented.

2. Not even Dean Witter denies that the VISA venture creates efficiencies. VISA joined banks together to establish a network of card-issuing and merchant-signing members. Because of so-called network efficiencies, the original venturers admitted

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[18] *See, e.g., United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) ("*St. Louis Terminal*"); *Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982).

many new members with certain qualifications. According to petitioner, this "network" efficiency is the sole justification for collaboration. It must justify every one of its rules but cannot justify the exclusion of a new member who would add to the network efficiencies. This is the essence of the petition and it is wrong in three fundamental ways: it ignores free riding, incentives to form joint ventures, and the importance of favoring competition over combination.

3. Up to a point, new members add to a network's efficiency, as the petition argues. Yet different applicants for admission bring different benefits and costs to VISA as well as the economy. Excluding Dean Witter and American Express from VISA avoids the free riding that would result, for example, were they to use VISA's goodwill as part of joint solicitation or promotional campaigns (to cardholders and/or merchants) or when they obtain access to and influence over product development and marketing plans.[19] That VISA chose not to allow its major interbrand competitors to use the VISA brand is fully consistent with welcoming other new members.[20]

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[19]Dean Witter vigorously protests that "free riding" forms no part of its intentions. But VISA's value to it is only the free ride. Since Dean Witter independently established all of the systems and other infrastructure necessary to operate its own national credit card network, the only things it could get from VISA are the goodwill attached to the VISA brand and access to the VISA merchant base — neither of which it did anything to create. That is free riding and nothing but.

Nor does the possibility of "payment" solve the problem. Determining the appropriate charge for a system-level competitor would be extremely difficult, if not impossible. Indeed, as a practical matter that process is likely simply to lead to further litigation. More important, payment does not address either the issue of initial incentives or intersystem competition, discussed in text.

[20]At trial, Dean Witter made much of VISA's admitting others while "discriminatorily" excluding it. It further suggested that it could not demand admission had VISA been a closed venture in the first place. The petition's arguments, however, would require a "network"-type venture to admit all applicants, even if monopoly results. Indeed, a compulsory admission rule for open ventures would induce venturers to

VISA is an "open" venture — not unlike manufacturers or franchisors who expand the number of outlets but "close" their system to some new participants. Thus, it would not be unusual for McDonald's (1) to stop franchising in a certain area after enough penetration had been achieved or (2) to decline to allow Wendy's to own and operate McDonald's outlets even in an area where it was still "open," and even though Wendy's says "I can make tastier 'Big Macs' or sell them cheaper." It is neither counter-intuitive, nor uncommon, for a business not to want to help its competitors. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

4. Efficiency, properly understood, embraces not merely the narrow *ex post* effects of a particular decision to share one's property, but also the *ex ante* "macro" efficiencies that depend upon general assumptions about the way the economy works. As Prof. Areeda noted several years ago, the efficiency justification for refusing to imply a duty to share one's creations with others rests fundamentally upon broad policy considerations:

> These legitimate business purposes are not personal to any particular defendant, but are propositions of general policy. For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.

Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851 (1990).

There is no question that the foregoing principles apply to the property of single firms. Indeed, no one would take a demand for compelled sharing of a single firm's property seriously. *See, e.g.,*

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create only closed ventures even when additional members would be efficient for the venture and procompetitive for the economy.

Olympia, 797 F.2d at 375-76. There is no reason to apply a different rule generally to joint ventures. *St. Louis Terminal* said as much in 1912.[21] In fact, both Dean Witter's trial expert and its academic consultants not only acknowledge the need to protect property rights and incentives for innovation, but concede that such considerations generally apply to the property of joint ventures as well as single firms. *See* R. at 829-33. It could not be otherwise since a different rule would discourage the formation of joint ventures by making their property and innovations less secure against forced sharing and, hence, less valuable.

These are scarcely novel observations. In fact, prior to the cottage-industry of post-trial writings by Dean Witter's consultants,[22] the efficiency-enhancing attributes of joint venture mem-

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[21] *St. Louis Terminal* is often referred to as the source of the essential facilities doctrine under the Sherman Act. It involved a group of railroads that had acquired a monopoly over the means of crossing the Mississippi River. The Court remedied the monopolistic combination by requiring admission of the excluded railroads, but only after very carefully limiting its scope. Invoking *Standard Oil's* observation that a "fundamental purpose[ ] of the [Sherman Act] is to protect, not to destroy, rights of property," 224 U.S. at 409, the Court held that "in ordinary circumstances," a group of independent companies might combine to control facilities for their "exclusive use." Others could thereafter "be admitted" on any terms set by the owners or could be "excluded altogether." 224 U.S. at 405, 409. It was only where "inherent conditions" (or some other insuperable obstacle) made fair competition impossible (and, therefore, made access "essential") that a duty to deal might be imposed. *See, e.g.*, Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999, 1088-89 & n.339. (Research for the Baker article was funded by several VISA members.)

[22] *See* Carlton & Frankel, *The Antitrust Economics of Credit Card Networks*, 63 Antitrust L.J. 643 (1995); Carlton & Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*, Working Paper No. 111, Center for the Study of the Economy and the State, The University of Chicago (April 1995); Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (forthcoming Summer 1995). Every one of these authors is a retained consultant in this case for Dean Witter, although

bership limitations was nearly universally recognized. For example, Prof. Robert Pitofsky, now Chairman of the Federal Trade Commission, has noted:

> Why should joint venturers, particularly those who took significant risks in order to establish the project, offer the advantages of membership to rivals? Incentives for risk-taking and innovative efforts will certainly diminish if advantages of the undertaking must be made available to non-participants. The [compulsory access] rule becomes even more questionable where the rival applicants passed up an opportunity to participate in the joint venture in the first place.

Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 Antitrust L.J. 893, 902-03 (1985).

Similar observations were made by Joseph Kattan, former head of the Policy Section of the FTC's Bureau of Competition:

> From an efficiency standpoint, mandatory access rules are troubling. Limitations on joint venture membership offer a great procompetitive potential .... [A] requirement of mandatory access after a venture has succeeded in attaining its goals [also] can inhibit collaborative efforts to innovate in the first place. If free and open access is required, potential venturers may decide to avoid entering a joint venture, and incurring the risk that membership in the venture entails, because they may be required to share the fruits of the joint venture with outsiders if the venture succeeds but will be required to bear the losses alone if the venture fails. This free rider effect creates a serious risk that some efficiency-enhancing projects would be delayed or altogether deterred.

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none was ever called as a witness or made available for cross-examination. Given these relationships, Dean Witter should hesitate to point to these consultants as "commentators" who have "already specifically criticized the mischievous implications of the Tenth Circuit's market power analysis in this case." Pet. 29.

Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 963 (1993).[23]

5. Far from condemning membership limitations, the primary antitrust concern is that a joint venture might become "*over*inclusive" by admitting those who can compete effectively with the venture. *See* Department of Justice, *Antitrust Enforcement Guidelines for International Operations, reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109 (1988).[24] Yet, Dean Witter insists here that antitrust law requires the partial integration of Dean Witter

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[23] *See also EFT, supra*, ¶ 21.05[2], at 21-36 (duty of joint ventures to "grant compulsory access to their competitors whenever they achieve a really significant success . . . blunt[s] their incentive to invest and innovate"); Balto, *Access Demands, supra*, at 667 ("Where the excluded party is able to compete effectively with the joint venture, its mandatory admission into the venture is likely to diminish competition in the market in which the venture competes."); Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as an Illustration*, 58 Antitrust L.J. 855, 868 (1990).

[24] The joint venture discussion in the 1988 Guidelines (quoted at length by the Tenth Circuit, App. 25a n.20) was not included in the 1995 revisions of those guidelines because the earlier version did not address any issue uniquely germane to international commerce. However, there is no reason to believe that the Department's view of the subject of joint venture membership rules has changed. Dean Witter pretends otherwise, suggesting that the Department's 1994 Health Care Guidelines are somehow at odds with the Tenth Circuit's opinion (Pet. 17-18, 28). However, Dean Witter inexplicably ignores the portion of the guidelines most directly pertinent to the issues here. *See* Dep't of Justice & FTC, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, 67 Antitrust & Trade Reg. Rep. (BNA) (Supp. Sept. 29, 1994), at S-24 (exclusion from multiprovider networks raises competitive concerns only if "providers are *unable to compete effectively* without access to the network, and competition is thereby harmed. . . . In addition, in certain circumstances network membership restrictions may be procompetitive by giving nonmember providers the incentive to form other networks in order to compete more effectively with the network.") (emphasis added); *see also* Balto, *Access Demands, supra*, at 673.

with VISA — thereby *increasing* its market power in the sense Dean Witter uses that term (*see infra* p. 23), potentially to monopoly[25] — even though such integration is not essential to its effective competition.

Dean Witter argued at trial that these concerns were beside the point because it did not intend to abandon Discover if it became a VISA member. But VISA did not suggest otherwise and nothing turns on that point. Rather, VISA's point is that both VISA's and Dean Witter's competitive incentives inevitably would be affected by Dean Witter becoming both a proprietary system owner and a major card association member. Dean Witter in particular would have strong incentives to coordinate its brand strategies as well as to attempt to blunt VISA's competition against Discover. *See* 5 P. Areeda, *Antitrust Law* ¶ 1203c, at 319-20 (discussing potential effects of partial integration on competitive incentives, including possible misuse of confidential information or the creation of "tacit understandings"). Moreover, the relative amount of resources (financial and human) devoted to Dean Witter's two brands could well be affected, particularly over time. *See* Balto, *Antitrust and Credit Card Joint Ventures*, 47 Consumer Fin. L.Q. Rep. 266, 271 n.38 (1993).

Nor are these concerns merely theory. At trial, VISA introduced a memorandum from a high-ranking Discover official who urged Dean Witter to apply for membership in VISA in 1988 (even though Dean Witter then had no plans to issue a VISA card) because Discover would be "in a position to know everything that takes place at VISA." R. at 1346. Equally candidly, Dean Witter's CEO testified that he wanted to join VISA because VISA and its members were competing too aggressively against his new Discover brand and he hoped to "limit" that competition by being on the inside. R. at 387-89.

Dean Witter's argument substantially undervalues the importance of preserving competition at the system (or brand) level.

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[25] American Express filed an *amicus curiae* brief in support of Dean Witter below and has stated its intention to follow Dean Witter in issuing a VISA and/or MasterCard. *See* Einhorn, *One Word: Plastic*, Barrons, Sept. 19, 1994, at 29, 33.

But many important types of competition in the charge card business take place at the systems level. The district court, as trier of fact, found that preservation of such competition yielded important benefits for consumers and that, on balance, the benefits of such preservation exceeded any intrasystem benefits which might result from Dean Witter's forced admission — although not by a sufficient margin to support an injunction under Section 7 of the Clayton Act. *See* App. 70a-71a, 96a-97a.

Dean Witter professes shock that VISA failed to welcome the reduction of competition that would have resulted from its partial integration with Dean Witter. In fact, of course, a firm may prefer to resist combinations potentially resulting in monopoly because of possible regulation by federal or state antitrust suits. More important than petitioner's doubt about VISA's state of mind, however, are the facts about competition. Admitting Dean Witter and American Express would significantly threaten intersystem competition (where the market is already highly concentrated), without any offsetting showing that adding yet another issuer to the thousands that already exist would have a material impact on issuer competition. The Tenth Circuit readily perceived the perversity of that outcome. Invoking contrived arguments about ancillary restraints based upon an insupportably narrow view of economic efficiency states no case for review by this Court.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO MARKET POWER; NOR DID THE DECISION BELOW TURN ON MARKET POWER ALONE.

Market power is important in rule of reason cases because it has the potential to save courts and litigants from the burden, expense and possible error of evaluating a practice which has no potential to harm competition in any event. *See, e.g., Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir. 1989); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986). It is a structural way of getting to the question that antitrust law is directly concerned with: whether a particular practice is likely to raise prices or

restrict output in some relevant area of commerce. As this Court noted in *FTC v. Indiana Federation of Dentists,* market power is simply a surrogate for evaluating actual effects. 476 U.S. 447, 461 (1986); *cf.* Hay, *Market Power in Antitrust,* 60 Antitrust L.J. 807, 825 (1992).

Dean Witter alternatively seeks *certiorari* because of an alleged conflict among the circuits about "the role and definition of market power" in joint venture cases. Pet. 22-30. Review is no more appropriate on this ground. First, Dean Witter's entire argument depends on the false premise that, in deciding this case, the Tenth Circuit adopted a market power "screen" that was outcome determinative. Second, as with ancillary restraints, there is no meaningful conflict in any event.

1. The principal market power issue addressed by the court below was not the existence of a market power "screen" but Dean Witter's "collective share" thesis. Dean Witter argues that VISA's market power should be measured by comparing all VISA volume with total volume in the stipulated market for general purpose charge cards (adding in MasterCard volume to boot). The Tenth Circuit rejected Dean Witter's market power analysis as fatally flawed because it had nothing to do with the underlying "effects" question the court was attempting to answer: to wit, whether excluding Dean Witter and American Express from a 6,000 member venture (with an issuer-level HHI below 500),[26] and with no restriction on pricing, geographic distribution or output by any of the system's members gives VISA's members (or anyone else, for that matter) the power to raise price or restrict output.

To measure market power the Tenth Circuit correctly asked, in effect, "power to do what?" The answer depends on the threat to competition that Dean Witter alleged — namely, preventing Dean Witter from issuing a VISA card. Because members do not

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[26] "HHI" refers to the Herfindahl-Hirschman Index, a statistical method for measuring market concentration. An industry with an HHI of less than 1,000 is considered unconcentrated for market structure purposes. *See* Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805, 1821 (1990).

collectively determine the prices or output of VISA's many issuers, one must measure power, not by reference to collective market shares, but by the structure of competition among card issuers and the effect of the brand exclusion upon such competition. Not only are there some 6,000 issuers of VISA cards alone, but nothing prevents Dean Witter from charging low subscription fees or interest rates on any existing or new version of its Discover card including, if it chose, one with all of the features of its proposed Prime Option card (except the VISA name). The Tenth Circuit correctly saw a highly competitive market for the issuance of general purpose charge cards that would not be noticeably more competitive whether or not Dean Witter issued a VISA card.

This point was explained at trial by VISA's expert, Richard Schmalensee. It is explained again, in only slightly more conceptual terms, in a recent article which he co-authored with Prof. David Evans, *Economic Aspects of Payment Card Systems and Antitrust Policy Toward Joint Ventures*, 63 Antitrust L.J. (forthcoming 1995). As they note:

> When established sellers get together to prevent another firm from entering the market, they prevent price (and other) competition between the potential entrant and all existing firms. Assuming that the existing firms are competitive in all other respects, the effect of the exclusion does not depend on the market share of the firms that acted to prevent entry but on the amount of competition excluded. Even if all existing sellers with 100 percent of the market prevent entry, prices would not increase (or output decrease) if they only barred a small potential competitor . . . . What we need to know . . . [therefore] is what the market would look like with and without the exclusion. That is the only inquiry that helps us get to the question that market power analysis is designed to answer. Market effects therefore depend on the magnitude of the output excluded from the market, and aggregating the market shares of the "excluders" does not address that issue.

What is more, the Tenth Circuit did not even rest its reversal upon its conclusions about market power. What is called an analysis of market power is equally well described as an analysis

of effects (or, rather, the absence thereof). Indeed the court made that point explicitly. Assuming *arguendo* that Dean Witter somehow demonstrated market power through its "collective share" thesis,[27] the court held that petitioner's case still failed because of its inability to prove any adverse *effect* upon competition. *See supra* p. 12. Indeed, the opinion specifically takes Dean Witter to task for its failure to focus meaningfully on effects:

> [I]t is not the rule-making *per se* that should be the focus of the market power analysis, but the *effect* of those rules — whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. Although [Dean Witter's expert] testified "*if* they can keep prices up or from falling they can make a lot of money" to support his conclusion that Visa USA possesses market power, there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.
>
> Thus, without any eye on effect, the very exercise of rule-making became the factual basis for rule of reason condemnation of Bylaw 2.06. Consequently, rule-making was not only divorced from its functional analysis but also from the facts of the case.

App. 19a (emphasis added).

Nor was market structure the only obstacle over which Dean Witter stumbled irretrievably. Confronted with a competitive and diffuse market, petitioner was unable to adduce any evidence of supracompetitive profits or any other indicia concerning price or output suggesting that the competitive structure of the issuing market somehow failed to reflect actual market conditions.[28] *See* App. 25a.

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[27] *See* App. 18a: "*even if* Visa USA possesses market power . . ." (emphasis added).

[28] Petitioner did attempt to color its jury case with assertions about VISA banks' "high profits," but such assertions cannot be equated with "supracompetitive" profits absent "evidence, such as studies on the comparative costs of production or on market conditions, to indicate that

In short, Dean Witter's case failed without regard to any particular standard of market power. It failed because of petitioner's simple — if wholly predictable — failure to prove harm to competition. However much petitioner may attempt to stand the concept of harm to "competition, not competitors" on its head (*see* Pet. 13, 27) its failure to prove anything more than a loss to itself obviates the asserted need to review any other issue.

2. Petitioner's strained effort to assert an inter-circuit conflict on the role of market power in applying the rule of reason founders on the same rock as its other purported conflict — a misguided assumption that courts can or should adopt a single set of words to describe an approach to market power. *Cf. Miroyan v. United States,* 439 U.S. 1338, 1339 (1978) (Rehnquist, Circuit Justice) ("difference of approach" is different from "square conflict"); *see also* Cole, *Petitioning for Certiorari in the Big Case,* Litigation, Spring 1986, at 33, 34 ("A true conflict is what Professor Felix Frankfurter called a 'head-on collision' between two courts."). All courts applying the rule of reason recognize the great importance of market power or actual effects. Some courts speak of substantial power as a preliminary hurdle (filter or screen) that must be jumped before proceeding further — especially when a plaintiff has failed to prove a relevant market at all, the defendant's market share seems truly trivial, or the relevant market is vigorously competitive in structure or results. That a failure to prove market power can doom a rule of reason claim hardly requires examination or explication by this Court.

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these profits were above those available in a competitive market." *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.,* 971 F.2d 37, 52 (7th Cir. 1992); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 113 S. Ct. 2578, 2595 (1993); Hay, *Market Power, supra,* at 825 ("[p]rofits can be the result of luck, skill, or simply the short-run disequilibrium of an industry"). Moreover, no inference of supracompetitive pricing could have been drawn here when much of the competition in the charge card industry is "nonprice" competition, such as high credit limits, more lenient credit approval standards, or purchase "add-ons" such as frequent flier miles or credit towards the purchase of other products. *See Brooke Group,* 113 S. Ct. at 2594.

Nor is there any inconsistency among the circuits when the courts buttress their doubts about market power with observations about the legitimacy of a defendant's conduct. Indeed, far from conflicting with other circuits, the Tenth Circuit here variously described the role of market power as a "filter," "screen," or "presumption," while also favoring a "two-step process" that considers an alleged restraint's redeeming virtues.[29]

3. Dean Witter's further claim that the Tenth Circuit required it to prove that it was excluded "*entirely* from the market" is false. Rather, the Tenth Circuit emphasized the lack of evidence that excluding Dean Witter from VISA disabled it from *effective* competition in the stipulated market. (App. 25a-26a.)

III.

THIS CASE IS INAPPROPRIATE FOR REVIEW IN ANY EVENT.

The stated premise underlying Dean Witter's petition is that joint ventures present increasingly important antitrust issues that this Court has not fully addressed. But whatever "great" joint venture issues might exist in theory do not arise *on the record in this case* or the Tenth Circuit's routine disposition of it.

1. The court of appeals simply ruled that there was no proof of sufficient power or effect. While petitioner may quarrel with that

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[29]Thus, for example, the petition asserts a conflict between the decision below and the Second Circuit's decision in *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 388 (1993). In fact, the Second Circuit affirmed judgment for the defendant as a matter of law on account of plaintiff's failure to meet its "initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market . . . ." 996 F.2d at 543 (emphasis in original). In addition, the Second Circuit goes at least as far as the Tenth in noting that market power is a "highly relevant factor" and in quoting with favor Prof. Areeda's observation that "[w]hen market power is lacking, antitrust litigation is not needed to police restraints and maintain competition . . ." 996 F.2d at 546 (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429).

determination, it does not seek review on that ground but on invented conflicts. *Cf. NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

2. The petition is inconsistent with the theory on which Dean Witter tried the case below. The petition's arguments make no distinction between open and selectively closed joint ventures, while Dean Witter argued at trial and in the Tenth Circuit that its position depended heavily on VISA's having adopted only recently a rule closing it to firms like Dean Witter and American Express. *See* App. 23a. Issues involving such a generally-open-then-selectively-closed venture are hardly so widespread as to need this Court's resolution.

3. The alleged anticompetitive effect that Dean Witter asserted before the Tenth Circuit and in its petition is its exclusion from issuing VISA or MasterCard "bank cards," although the relevant market to which Dean Witter *stipulated* was the general purpose charge card.[30]

4. Accepting the petition's invitation to pronounce abstractly on ancillarity is inappropriate when the "efficiency" concept is so much broader than the petition asserts and when there was no proof of market power, supracompetitive pricing or anticompetitive effects.

5. Petitioner's claim that VISA's by-law was anticompetitive on the separate ground that it would discourage present or future VISA members from developing proprietary cards is not

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[30]The implicit suggestion that there is some narrower market, limited to the bank association cards, is far-fetched in any event. Consumers, in fact, carry many credit cards. They do so for many different reasons, ranging from a desire for multiple credit lines, to different features, to a need to maintain separate personal and business accounting, to mention but a few. However, the fact that one consumer carries a Citibank VISA card and a Chemical Bank MasterCard, another carries a Bank of America VISA, an American Express True Grace and a NationsBank VISA, and still another carries a Chase Manhattan VISA card and a Dean Witter Discover card scarcely suggests that Discover has been excluded from anything — let alone that there is a separate market limited to "bank cards."

presented by this case. The claim involved no proof but only "the widest array of speculation." App. 19a n.14. Moreover, Dean Witter already had developed a successful proprietary card and could not itself have been harmed but only benefitted by any "disincentive" for the creation of other new proprietary cards. Thus it lacked standing to seek either damages or an injunction on that basis. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-38, 342 (1990); *see also Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (same re injunction). Nonetheless, this speculative claim was submitted to the jury under instructions and a verdict form that make it impossible to determine what weight the jury gave to any particular evidence or theory. Petitioner cannot now ignore that problem, either in describing what the jury "surely perceived" (Pet. 21) or "specifically found" (*id.* at 27), or in attempting to isolate controlling legal issues for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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No. 94-1719

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

v.

VISA U.S.A. INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Miscellaneous Authority:

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U.S. Department of Justice, Antitrust Division, and Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, 67 Antitrust & Trade Reg. Rep. (Sept. 29, 1994 Supp.) 6

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BRIEF OF AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

American Express Travel Related Services Company, Inc. ("American Express") is one of the four significant systems competitors in the market for general purpose charge and credit cards in the United States. The other three are the Discover Card, which is issued by an affiliate of Petitioner, Respondent Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard").[1] By reason of its overlapping membership with Visa, MasterCard does not engage in significant interbrand competition with Visa. Accordingly, American Express

[1] In addition to these four major systems competitors, affiliates of Citibank, N.A., Visa's largest member, issue Diners Club and Carte Blanche cards.

is the only effective systems competitor which is not a party to this action. If the Court does not issue a Writ of Certiorari to the Tenth Circuit and does not reverse the Tenth Circuit's decision, interbrand competition and consumers will be seriously injured.

STATEMENT OF THE CASE

In 1990, Dean Witter, Discover & Co. ("Dean Witter") purchased the assets of the predecessor to Petitioner MountainWest Financial Corporation ("MountainWest") which was already a member of Visa. Dean Witter thereupon sought to use MountainWest to implement a strategy to issue multiple general purpose charge and credit cards—the Discover Card and a MountainWest Visa card called The Prime Option Card. Visa invoked its By-law 2.06 to prevent MountainWest from issuing its Prime Option Card.[2]

MountainWest commenced this action alleging a violation of Section 1 of the Sherman Act. In the District Court, a jury found that Visa (i) possessed market power in the general purpose charge and credit card market, (ii) exercised that power when it collectively excluded MountainWest from Visa membership, and (iii) thereby injured competition. Accordingly, the jury found Visa had violated Section 1 of the Sherman Act.

On appeal, the Tenth Circuit focused exclusively on the functions in the charge and credit card business which

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[2] At the time of MountainWest's attempt to issue the Prime Option Card, Visa had already adopted By-law 2.06, which purports to exclude from Visa membership any entity which issues Discover Cards, American Express Cards, or any other card deemed competitive with Visa, or an affiliate of any such entity. While Diners Club and Carte Blanche cards are clearly competitive with Visa cards, they are nonetheless exempt from By-law 2.06 solely because they are owned by Citibank. Visa adopted By-law 2.06 in response to an earlier effort by Dean Witter to gain membership in Visa through another financial institution. Although it has not adopted any similar formal, written rules, MasterCard has engaged in the same exclusionary practices as Visa.

are associated with issuing credit cards to consumers. It concluded that, since there were thousands of issuers of Visa credit cards and no one issuer had a dominant share of an "issuer market," Visa did not have market power in the "issuer market." Concomitantly, it concluded that, since elimination of MountainWest as an issuer of Visa cards represented nothing more than the elimination of one of thousands of competitors, there could not be any harm to competition—*e.g.*, consumers. This conclusion led to its analysis of the role of market power as a threshold screen in rule of reason cases and of the business justification for admitted collective restraint on competition which are addressed in MountainWest's Petition For A Writ of Certiorari.

SUMMARY OF ARGUMENT

American Express submits that the rule of law established by the Tenth Circuit is likely to result in significant harm to interbrand competition in the market for general purpose charge and credit cards.

The effect of the Tenth Circuit's decision is that (i) innovative competitors like American Express and Dean Witter will be prevented from issuing Visa or MasterCard cards and (ii) interbrand competition with Visa and MasterCard will be undermined because a wide variety of financial institutions will be deterred from issuing cards bearing their own proprietary brands or the brands of American Express or Discover for fear of denial of the benefits of Visa membership. These restraints on the issuance of such competitively branded cards will limit consumer choice to the brands now available, and the development of new, innovative products will be substantially stifled.

ARGUMENT

I. VISA HAS MONOPOLY POWER WITH RESPECT TO INTERBRAND COMPETITION

The Tenth Circuit limited its analysis of market power and competitive injury to the competition among issuers of bankcards. By focusing solely on such intrabrand competition, it concluded that the "issuer" market is "atomistic" because there are thousands of bankcard issuers and, therefore, held that any collective restraint on new membership was effectively immunized from antitrust scrutiny. It casually brushed aside Dean Witter's effort to focus on the adverse impact on interbrand competition by noting that "[a]lthough the District Court did not end its rule of reason analysis upon that finding [that Visa had market power] the conclusion set the path for its uncharted journey upon a landscape of speculation, conjecture, and theoretical harm." *Visa USA, Inc. v. MountainWest Financial Corp.*, 36 F.3d 958, 969 (10th Cir. 1994).

Furthermore, by limiting its analysis to the impact on competition at the issuer level, the Tenth Circuit ignored the clear realities of the market place. Issuers of credit cards issue cards only in the context of credit card networks or systems, such as Visa and MasterCard. These networks or systems develop and maintain networks of merchants which accept the cards bearing their brands.[3] They also electronically link merchants to issuers of credit cards and provide electronic authorization and financial settlement functions. Without these functions, credit and charge cards are useless and irrelevant to consumers and merchants alike. Visa itself has emphasized the importance of these systems to competition.

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[3] Each of the four general purpose credit card systems markets its services to cardholders and merchants alike through a unique brand associated with the system. Hence intersystem competition is also interbrand competition. As such, the terms will be used interchangeably herein.

> "Certain important functions are (and must be) carried out at the system level. Thus, Visa, itself, provides the mechanisms through which millions of Visa transactions are approved and settled between members every day. *App.* 423-32, 1408. It also defines the quality of service at the point of sale and operates a nationwide lost card and customer complaint service. *App.* 423-32, 1403 A-B. As demonstrated at trial, many technological and product developments are attributable to competition between charge card systems . . . . Similarly, competition with other card brands has prompted Visa to develop numerous product enhancements (e.g. Visa Gold). *App.* 428-33

Opening Brief of Appellant Visa U.S.A. Inc. in The United States Court of Appeals for the Tenth Circuit ("Visa Brief") at 10.

Each of the four major existing systems—Visa, MasterCard, American Express and Discover—performs these functions. The skill with which they do so differentiates them from their rivals and provides a preeminent opportunity for competition and enhancement of consumer welfare. By seeking to improve their systems' functions they are able to attract consumers to utilize cards bearing their respective brands.

Visa itself has aggressively asserted the significance of such interbrand competition:

> "There is also competition at the system level. Thus, for example, Visa (or MasterCard), Discover, and American Express compete on technologies, system functions, advertising and product innovation . . . . The competitive structure at the system level is quite different from that at the issuer level. There are, at most, four or five competing card systems: Visa, MasterCard, Discover, American Express and, in Sears' view, Diners Club. The HHI at the system

> level is a highly concentrated 3231. *See Opn.* 993 at n.433." [4]

Visa Brief at 61-62.

Because virtually all banks that belong to Visa also belong to MasterCard, banks that issue MasterCard cards do not engage in any serious competitive activity against Visa at the brand level. Moreover, since Visa and MasterCard control in excess of 70% of the business conducted in the general purpose charge and credit card market, the Tenth Circuit concluded that

> "these raw figures may suggest Visa USA possesses market power in the intersystem market."

Visa v. MountainWest, 36 F.3d at 967.

However, by limiting its analysis of market power and competitive injury to competition at the individual issuer level, the Tenth Circuit ignored this Court's holding that "interbrand competition . . . is the primary concern of the antitrust law." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). It also ignored a trial record replete with evidence of injury to interbrand competition caused by By-law 2.06.

The jury found that By-law 2.06 had a harmful effect on interbrand competition. Dean Witter would not have developed its proprietary Discover card had it known that it would be faced with an either-or choice between competing solely within Visa or from without. (Appendix 320-21)[5] Dean Witter instead had a multicard strategy

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[4] It should be noted that this admission by Visa that the credit card industry is "highly concentrated" by itself would render By-law 2.06 suspect under the Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust issued jointly by the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on September 22, 1994, which provide that exclusivity arrangements in joint ventures with greater than 20% share will receive heightened scrutiny.

[5] Since no appendix has yet been filed in this Court, references to the record herein are to the Appendix and Supplemental Ap-

(*i.e.*, proprietary brand plus a Visa or MasterCard brand) predicated on the belief that the ability to compete effectively in the credit card market required access to the nearly universal coverage that Visa's 6,000 members had achieved by pooling their vast resources. The effect of By-law 2.06 will be that actual and potential issuers of general purpose charge and credit cards will be deterred from pursuing such a multicard strategy. (Supplemental Appendix M490-514, M515-51, M688-89) The ability to pursue multicard strategies would unquestionably strengthen interbrand competition by creating cost efficiencies and permitting competitors to utilize economies of scale and scope not otherwise available. (*See e.g.*, Supplemental Appendix M700-04, M708, M710-12, M281-339, M627; Appendix 750-54, 1097, 1549-68)

However, By-law 2.06 has foreclosed these procompetitive activities. Accordingly, no firm has attempted to introduce a new general purpose proprietary card outside the two bankcard networks since enactment of By-law 2.06. Indeed, expert testimony at trial established that By-law 2.06 "provide[s] a very, very substantial disincentive, a kind of penalty, if you will, for the development of new proprietary cards in this market." (Appendix 690, 763)

Although the jury and the District Court considered all this evidence of competitive injury to interbrand competition and found that Visa's By-law 2.06 violated the antitrust laws, the Tenth Circuit ignored it and ruled as a matter of law that Visa's restraint of competition did not violate the Sherman Act, even if it made Dean Witter a less effective competitor.

The Tenth Circuit's failure to analyze the impact of Visa's By-law 2.06 on interbrand competition caused it to reach two fundamentally flawed conclusions. First, it

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pendix filed by the parties in the United States Court of Appeals for the Tenth Circuit.

held that neither Visa nor any of its members possessed market power, thereby ignoring Visa's overwhelming market dominance in the systems (*e.g.*, interbrand) market. This erroneous finding of the absence of market power led it to conclude that, under a rule of reason analysis, Visa's By-law 2.06 could not, as a matter of law, pose a significant competitive threat. Consideration of intersystem competition would have led to a contrary result.

Second, the Court limited its evaluation of actual injury to competition to its effects on competition between individual issuers, thereby wholly ignoring the serious injury, at the interbrand level, to competition and consumers resulting from By-law 2.06.

II. VISA'S BY-LAW 2.06 SUBSTANTIALLY RESTRICTS COMPETITION AND CONSUMER CHOICE IN INTERBRAND COMPETITION

Visa's By-law 2.06 is not incidental or innocent. It was adopted and has been enforced by Visa as part of a collective plan to undercut the utility of the general purpose cards of credit card systems which compete with Visa.

The utility (usefulness) of a credit card product to a card holder depends upon a variety of closely interrelated features such as value, customer service and merchant acceptance of the card. Similarly, the utility of a credit card product to merchants who accept it is dependent upon features such as discount rate, payment terms and volume of traffic. The strength and vitality of a credit card system/brand is directly dependent upon the interrelationship of two sets of factors which determine card utility. For example, the utility of a card to a card holder turns in large part on whether it is accepted at the business establishments he or she frequents. A card which is not accepted at virtually all airlines, car rental agencies, hotels and restaurants would have relatively low utility for a frequent business traveler. On the other

hand, a card which is widely accepted at such travel and entertainment locations, but not in retail establishments, such as service stations, pharmacies and hardware stores, would have relatively little utility to a nontraveler who wished to use a credit card primarily for retail purchases. Thus, the degree of merchant coverage is a critical component of utility, which determines whether a consumer will carry a particular card.

Merchants, on the other hand, are induced to accept a card for purchases based upon their perception that a great many consumers carry the card and will use it if the establishment accepts it, thereby increasing the merchant's volume of business. Thus, a card which is carried predominantly by business travelers may not be of great interest to local retail establishments.

A credit card system grows or diminishes in strength by the interplay of these different characteristics of utility. If a credit card system, such as American Express, can successfully increase the number of merchants who accept its products in given industry segments, then its success in increasing the number of card holders will be directly enhanced. This enhanced number of card holders will cause an increased demand to use the card at merchant locations, which results in expanded merchant coverage. The reverse is also true. Diminished merchant coverage reduces the number of card holders which, in turn, tends to further reduce merchant coverage. This growth (or shrinking) of networks by the interplay of factors external to the network itself—mutually reinforcing merchant and card holder perceptions—is common to all network businesses such as telephone companies, automated teller machine ("ATM") networks and airlines. Such "network externalities" can, and do, determine competitive success in all networks and particularly in the credit card business. Put starkly, more card holders results in more merchants and more merchants results in more card holders.

This undeniable economic phenomenon renders absurd Visa's "property rights" argument, that it has restricted Visa membership in order to preserve the benefits of the joint venture. Permitting new aggressive issuers access to Visa's network could only increase network externalities and thereby render the joint venture more valuable for all of Visa's members. In fact, Visa is constantly admitting new members almost without regard to their affiliations so long as they do not issue a competitive card product. The fact that Visa has acted to diminish the impact of such network externalities can only be explained by Visa's desire to limit interbrand competition.

A. By-law 2.06 Erected Barriers To Entry Which Have Prevented New Entry

It is undisputed that Dean Witter decided to create its own proprietary system, and thereby introduce a new brand onto the credit card landscape, only as part of a multicard strategy which also included issuing a bankcard under at least one of the Visa or MasterCard brands. Dean Witter would not have considered introducing a new brand had it known it would be required to forego the economies of scale and financial benefits of bankcard association membership. Hence, if By-law 2.06 had existed at the time Dean Witter launched Discover, it would have joined Visa or MasterCard instead of introducing its proprietary card.

At the time of the launch of Discover, Visa identified over 100 firms which it considered "potential competitors" to Visa. Some of those firms were already members of Visa while others were not. They included companies such as Ford Motor Credit Co., General Electric Capital Corp., ITT Financial Corp., General Motors Acceptance Corp., and Chrysler Financial Corp., all of which had the financial and technical resources, together with existing networks of dealer and consumer relationships, which could potentially form the basis for the creation of a credit card system under a proprietary brand,

rather than the Visa brand. By adopting By-law 2.06, and subsequently enforcing it against MountainWest, Visa quite effectively served notice that the consequences of attempting to create a competitive brand of credit card was the loss of the huge financial benefits of Visa membership. By-law 2.06 also deprived such "potential competitors" of the technological and financial economies of scale inherent in a multicard strategy. Thus, By-law 2.06 dramatically increased the costs of establishing a new brand. Faced with these barriers, not one of the 100 "potential competitors" has attempted to launch a new proprietary brand. Virtually all of them have instead opted for Visa and or MasterCard membership.

The deterrent impact of the barriers to entry sanctioned by the Tenth Circuit's opinion is not limited to the charge and credit card market. The rule of law established by the Tenth Circuit is that any network joint venture may deny access to its network without regard to the extent of the joint venture's market power. Thus, whereas a single firm network with monopoly power would be constrained in its access rules by the antitrust laws, *see, e.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983), under the Tenth Circuit's ruling a joint venture with monopoly power has no such restraints. This rule of law may have very harmful effects in other joint venture network situations, *e.g.*, ATM's, debit cards, telecommunications joint venture and health care provider networks.

B. By-law 2.06 Was Intended To Limit Opportunities For American Express To Expand The Scope Of Its Interbrand Competition With Visa

The market for general purpose charge and credit cards is quite dynamic. It is growing rapidly and evolving, as demand emerges for new products. Similarly, new technological developments by credit card systems make possible an ever widening variety of products targeted at

increasingly differentiated consumer segments. American Express has historically been a leader in developing and introducing such innovative products.

For example, American Express has developed and introduced corporate card and purchasing card products which are extremely attractive to business customers. The unique combination of discount structure, customer service, world wide capabilities, travel services and management information systems developed by American Express has given these American Express products significant competitive advantages. Those features make issuing an American Express branded corporate card or purchasing card product, which would be processed over the American Express network, highly desirable to a wide variety of financial institutions which might be interested in entering the credit card business.

American Express may wish to expand its interbrand competition with Visa by entering into arrangements with financial institutions which would issue American Express branded corporate or purchasing card products. Visa's By-law 2.06, however, will cause these institutions to be reluctant to consider entering into such arrangements with American Express. For the same reasons that none of Visa's "potential competitors" have decided to issue a "competitive" card under their own brand, no such institution will likely forego the potential benefits of Visa membership if that is the price of issuing an American Express branded card.[6]

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[6] Nor is this impact limited to American Express. The same effect will undoubtedly be felt by the fledgling credit card network that Dean Witter has developed. Dean Witter intends that the network of merchants that accept Dean Witter's Discover Card will be capable of supporting additional cards, which could be issued by Dean Witter or other firms. So long as By-law 2.06 remains in effect, however, it is highly unlikely that Dean Witter's network (which it calls the "NOVUS Network") will attract third party cards or become a serious competitor against the Visa network.

This deterrent effect of By-law 2.06 will be precisely that planned by Visa—a reduction of the effectiveness of innovative products offered by interbrand competitors with a reduction of potential transaction volume on their networks. Visa's intention in enacting and enforcing By-law 2.06 was to interfere with the network externalities of competitors and thereby undercut interbrand competition. Unless By-law 2.06 is invalidated, Visa may succeed and its already dominant position will become even more entrenched.

C. Visa's By-law 2.06 Prevents American Express From Expanding Its Innovative Product Offerings

Visa's By-law 2.06 precludes American Express from offering innovative charge and credit card products which bear brands owned by American Express, but which utilize the Visa network and share the Visa brand.

Through the collective resources of its 6,000 member banks, Visa has been able to develop a network of merchants who accept Visa branded products which provides nearly universal coverage and is extremely difficult for a single firm such as American Express or Dean Witter to duplicate in a timely and cost efficient manner. In order to strengthen its system and compete more effectively, in addition to continuing to offer card products on the American Express network, American Express may want the option of issuing credit card products bearing brands and offering services introduced by American Express, but utilizing the Visa network. American Express would thus have the ability to create products which have not been, and cannot be effectively, offered by current Visa members. Such products would enhance consumer well-being by linking credit/charge card services to other products and services which are unique to American Express. They would, at the same time, enhance American Express' market relevance and provide it with significant cost efficiencies and technological economies of scope and

scale, with the overall effect of strengthening American Express' ability to compete with Visa.

The pro-competitive, and pro-consumer, effect of such innovative product offerings has been eliminated by Visa's By-law 2.06. The effect is that consumers who require nearly universal coverage are relegated to accepting those products which the Visa membership chooses to offer and are denied the option of selecting unique, innovative products designed by American Express or Dean Witter. Moreover, these anti-competitive effects will occur in a context in which products which could be offered by American Express or Dean Witter over the Visa network would have increased the efficiency of the Visa network to the advantage of all existing Visa members. The only explanation for these restrictions is Visa's desire to further entrench Visa's dominant position.

The harmful impact of the Tenth Circuit's upholding By-law 2.06 transcends Visa's dominance of the credit card industry. The Visa joint venture, directly or through affiliates, controls other vital networks within the U.S. payment system, including debit card, ATM and merchant processing networks. Emboldened by the Tenth Circuit's decision, Visa will now feel free to use its monopoly power to further exclude competitors in these other critical areas. If Visa's anticompetitive practices are not restrained, there is a dangerous probability that Visa will ultimately achieve its long-articulated goal—to dominate and control the payment systems, leaving no room for competition.[7]

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[7] *See, e.g., Behind the Credit Card Network Grand Prix*, Credit Card Mgmt. 42, 43 (Sept./Oct. 1988), quoting Roger Peirce, then an executive vice president at Visa, "Visa expects to dominate the transmission of transactions between sources and destinations. I'm not sure there's room for anyone else."

CONCLUSION

For the reasons stated above, American Express respectfully submits that A Writ of Certiorari To The United States Court of Appeals should issue and the decision of that court should be reversed.

Respectfully submitted,

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May 19, 1995

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No. 94-1719

MAY 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,

Petitioner,

—v.—

VISA U.S.A. INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS* FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICI CURIAE*

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2pp

Consumer organizations participating as Amici Curiae

American Council on Consumer Awareness
Blount County Community Action Agency
Center for Public Representation
Citizen Alert
Colorado River Community Action Council
Communities Organized to Improve Life, Inc.
Conference of Consumer Organizations
Consumer Education & Protection Association for Kansans
Consumer Educators of Michigan
Consumer Fraud Watch, Inc.
Consumer Information Center, Springfield Action Commission
Consumer Protection Association
Harlem Consumer Education Council
Jamaica Consumer Education Council
Kling Center
Lynn Economic Opportunity, Inc.
Massachusetts Consumers Association
Michigan Consumer Federation
National African American Consumer Education Organization
Network for Professional Women
New Opportunities for Waterbury, Inc.
North Carolina Consumers Council
North Central-Flint Hills Area Agency on Aging
Northeast COMBAT, Inc.
Pennsylvania Citizens Consumer Council
United Communities Against Poverty
Wisconsin Consumers League

No. 94-1719

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,

Petitioner,

-v.-

VISA U.S.A. INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

MOTION OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The 27 consumer organizations listed on the inside front cover hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the Petitioner has been received. The consent of the attorneys for the Respondent was requested but not obtained as of the time this brief was printed.

Amici are 27 national, state and local consumer organizations with diverse political, economic and social agendas. One issue of surpassing concern for the constituents of all amici is the subject of general purpose charge cards and

those cards' fees and expenses. Charge cards play a dominant role in the American economy. At least one general purpose charge card is carried by a substantial majority of American consumers, and in 1993 alone more than $474 billion worth of goods and services were purchased with charge cards. It is estimated that by the year 2000, the annual volume of general purpose charge card transactions will top $1.2 trillion.

Most consumers take advantage of the charge cards' credit-granting feature. Approximately 68 percent of charge card users have revolving charge card debt; in 1994, the aggregate debt owed by consumers on general purpose charge card accounts topped $280 billion, more money than American consumers owed on automobile loans.

Of great significance for consumers, this borrowing takes place in a remarkably uncompetitive market. As of the time of this trial, the ten largest issuers of Visa and MasterCard, who accounted for half of the market, all charged nearly the same high interest rates and same substantial annual fees. Moreover, charge card interest rates have remained high despite the fall in overall interest rates over the past several years. In all, consumers paid over $30 billion in charge card interest charges in 1993, and another $3 billion in annual charge card fees.

Amici thus have a substantial interest in increased competition in the charge card market. Unfortunately, Visa's challenged bylaw prevents such competition by excluding Dean Witter's aggressively priced and marketed Prime Option Visa card and by effectively preventing other firms from introducing new products to compete with Visa.

Thus, amici respectfully seek leave to file their brief *amici curiae* in support of Petitioner's Petition for Writ of Certiorari

to demonstrate the adverse effects on consumers and competition in the general purpose charge card market posed by Visa's bylaw.

Respectfully submitted,

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May 19, 1995

QUESTIONS PRESENTED

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be: (a) reasonably related to the venture's business interests, irrespective of efficiencies; (b) reasonably necessary to enhance the venture's efficiencies; or (c) the least restrictive alternative to enhance the venture's efficiencies?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture: (a) an important factor but not a threshold requirement; (b) a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors; or (c) an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market?

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No. 94-1719

IN THE
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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are 27 consumer organizations of diverse constituencies and interests. For example, the American Council on Consumer Awareness, headquartered in St. Paul, Minnesota, is dedicated to providing education on consumer issues. By contrast, the North Central-Flint Hills Area Agency on Aging provides assistance and advocacy for senior citizens in an 18-county region in central Kansas.

One issue of surpassing concern for the constituents of all amici is the subject of general purpose charge cards and those cards' fees and expenses. Charge cards play a dominant role in the American economy. Nearly two-thirds of American

consumers over the age of 18 own at least one general purpose charge card, and the average card-carrying consumer has two or three such cards in his or her wallet. Moreover, the annual volume of transactions financed by charge cards is enormous: in 1993, general purpose charge cards were involved in 5.60 billion transactions with a total value of over $474 billion.

The pervasive importance of charge cards continues to grow rapidly. It is estimated that by the year 2000, the annual volume of general purpose charge card transactions will top $1.2 trillion. Also in that year, nearly one-half of all consumer payments that take place outside of the home will be financed by plastic -- primarily charge cards and their more recent cousins, "debit" cards. (By comparison, cash will be involved in only about one-third of such transactions.)

While some consumers use charge cards merely for their convenience, most take advantage of the cards' credit-granting feature. Approximately 68 percent of charge card users have revolving credit card debt; in 1994, the aggregate debt owed by consumers on general purpose charge card accounts topped $280 billion, more money than American consumers owed on automobile loans. Of great significance for consumers, this borrowing takes place in a remarkably uncompetitive market. At the time of trial in this case, the ten largest national issuers of Visa and MasterCard cards -- who collectively accounted for fully half of all such cards -- followed a nearly uniform pricing structure:

	Issuer	*Interest Rate*	*Annual Fee*
1.	Citicorp	19.8%	$20
2.	First Chicago	19.8%	$20
3.	AT&T Universal	15.9%	$20
4.	Chase Manhattan	19.8%	$20
5.	MBNA America	18.9%	$20
6.	Bank of America	19.8%	$18
7.	Nationsbank	17.9%	$18
8.	Chemical Bank	17.8%	$20
9.	Banc One	19.8%	$20
10.	Wells Fargo Bank	19.8%	$18

None of these national issuers offered the combination of low rates and no annual fee envisioned by Dean Witter's Prime Option Visa card.

Moreover, credit card interest rates have remained high despite the fall in overall interest rates over the past several years. In March 1995, the average consumer dollar outstanding on a general purpose credit card account was subject to an 18.2 percent interest rate.

In all, consumers paid over $30 billion in credit card interest charges in 1993, and another $3 billion in annual credit card fees. Thus, the consumers represented by amici possess a substantial bottom-line interest in securing increased competition in the general purpose charge card market. Visa's Bylaw 2.06 has attracted substantial attention among consumer advocates because of its plain restraining effect on competition in this market, and its exclusion of Dean Witter's aggressively priced and marketed Prime Option Visa card. Amici therefore submit this brief to present the consumer perspective on the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Consumers have a large stake in the outcome of this case and an even larger stake in the resolution of the legal issues raised by the Tenth Circuit's decision. For both reasons, the Court will serve consumers well by granting the petition and clarifying the confusion and conflict that currently exist among the lower courts regarding the proper analysis of joint venture restraints.

Consumers benefit from efficient joint ventures such as Visa that reduce costs or enable a consortium of providers to supply a more attractive product than any single firm acting alone. As a general matter, consumers benefit when venture-wide output (measured by either quantity or quality) is increased. However, if such a venture goes beyond those activities which enhance efficiency, the potential for mischief is enormous. Such a venture can use the threat of exclusion or expulsion to impose the collective will of the group upon individual members and prospective members. Restraints of trade such as joint price setting and exclusivity requirements are just two obvious examples. Competitive harms can be significant even if individual venture members continue to compete with each other in other respects.

Therefore, it is vital to consumer interests that the resulting tension between competition and cooperation be resolved in a manner that serves consumer welfare. To date, this Court has had few opportunities to pass upon the proper accommodation of these concerns, and the lower courts have interpreted the Court's pronouncements in a variety of conflicting ways. This case illustrates the harms that consumers suffer when courts adopt improper legal standards.

The Tenth Circuit's market power analysis wrongly assumes that competitive harm cannot result from a joint venture exclusion where the venture has many members and the excluded firm remains in the market. Contrary to the court's analysis, economists have long recognized -- and this case

amply illustrates -- that pervasive harm to consumers can result from such exclusions. Similarly, the Tenth Circuit's misguided analysis of Visa's asserted "free riding" justification misunderstands the nature of the economic concern with free riders, and improperly ignores the existence of readily available less restrictive alternatives to meet Visa's asserted concerns. In both respects, the Tenth Circuit's rules allow joint ventures to protect their profits at the expense of consumers.

Most directly, the outcome of this case affects consumers in their use of charge cards. As detailed in the Statement of Interest of Amici Curiae, the general purpose charge card market is one of surpassing importance for American consumers. Prices in this market remain far above competitive levels, and the prices charged by the largest issuers of Visa and MasterCard cards have been little affected by competition from lower-priced alternatives offered by smaller issuers. The restraint of trade at issue here clearly was designed to perpetuate this lack of competition by cutting off the threat of increased price competition from aggressive and efficient large-scale national charge card issuers. If Visa's unreasonable restraint of trade is allowed to stand, consumers will be harmed greatly.

Although the Tenth Circuit's decision clearly would be worth the Court's attention even if this were the only market in which the decision's consequences are felt, the consequences are in fact much broader. The legal issues this decision raises are central to rule of reason analysis of joint ventures. Joint ventures, and especially network joint ventures, play an increasingly important role in numerous industries, from banking (ATMs, check clearinghouses, charge cards), to real estate (multiple listing services), to florists (nationwide delivery service). Such ventures also provide disparate other services in industries ranging from health care (provider networks) to newspapers ("wire" service), to telecommunications (cellular and long distance service) to computers and other electronics (via hardware and software standard setting).

In the face of these burgeoning opportunities for -- and threats to -- consumer welfare, consumers and businesses alike need clear and sensible antitrust rules. It is hard to imagine issues more central than those raised by the Tenth Circuit decision in this case: 1) the role and definition of market power in joint venture cases; and 2) the legal and economic bases on which joint ventures can defend the legitimacy of purportedly "ancillary" restraints.

I. The Tenth Circuit's Market Power Standard Improperly Ignores Anticompetitive Conduct That Harms Consumers.

A central purpose of antitrust law is to protect consumers from injuries caused by the exercise of market power. Market power can be asserted through explicit collusion on price, agreements to withhold new products, or concerted attempts to inhibit the competition of aggressive, efficient or innovative rivals. In each instance the result is the same: consumers either pay higher prices for the same goods, or are forced to accept goods or services inferior to those that unrestricted competition would have produced.

The exclusionary bylaw challenged by Petitioner in this case represents an attempt by a joint venture that controls a dominant share of the relevant market to inhibit an aggressive and efficient rival which seeks to expand competition to the benefit of consumers. Treading in the famously uncharted waters of rule of reason market power analysis,[1] the Tenth Circuit blessed Visa's bylaw as a matter of law because it did not exclude Dean Witter entirely from the relevant market and because Visa's 6000 members were too numerous to collude directly on price. *See SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36

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[1] *See, e.g., Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 546 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

F.3d 958, 968 (10th Cir. 1994). This analysis portends great harm for consumers.

To take an example based on this Court's jurisprudence,[2] consider a large and powerful joint venture in the construction industry that dominates its market and creates efficiencies giving members substantial advantages over non-members. The joint venture, whose members have traditionally produced steel conduit, decides to forbid its members from producing a new product, plastic conduit, which many consumers would prefer. This action will be profitable for the venture members: even though the exclusion does not make them wealthier or raise prices above current levels, it staves off a new source of competition -- thus helping them avoid losing market share that they already have -- and avoids a downward pressure on price.

An upstart firm wants to produce the new plastic conduit, which would increase output and thus be efficiency-enhancing. In view of the joint venture's rule, the firm is faced with the choice of abandoning the new product or striking out on its own and forgoing the efficiencies and market acceptance available to venture members. The Tenth Circuit's analysis holds that this choice poses no antitrust concern as a matter of law because the upstart will remain in the market (either inside or outside the venture) and because the venture's members have not directly colluded on price. But this is a demonstrably incomplete view of antitrust.

First, excluding plastic is at least as harmful to consumers as fixing prices. The exclusionary action denies consumers the benefits of new products that a competitive market would produce. Considering the quality and variety of products that would otherwise be available in the market, the decision to exclude plastic conduit is "output reducing" just as much as a decision to raise the price of steel conduit.

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[2] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

Second, the structural problems that would make collusion impossible do not affect the agreement to exclude plastic. Six thousand competitors would be unlikely to adhere to a cartel agreement. Moreover, monitoring the pricing of each member would be difficult in the best of circumstances, and would be impossible if pricing could be kept secret.[3] But these limitations have no application to an agreement preventing venture members from offering a certain product, from competing outside the venture, or excluding a firm from the venture altogether. A firm cannot clandestinely be a venture member or offer a competing product. Finally, any price-fixing agreement among venturers would be illegal per se, so enforcement would have to be kept secret, something that 6000 members would undoubtedly make impossible. But the Tenth Circuit's rule in this case makes enforcement of the exclusion rule legal, thus permitting it to be brought out in the open and even enforced through the legal process.

Third, anticompetitive injury occurs even if the upstart firm remains in the market. If the firm chooses to abandon the plastic conduit and become or remain a venture member, consumers will lose the benefits that plastic would have provided. If, on the other hand, the firm attempts to sell plastic on its own, its inability to gain from the venture's efficiencies means that its costs (and therefore prices) will be higher and its market penetration will be lower. Once again, consumers will suffer.

Fourth, the restraint will be most harmful to consumers if it takes the form of a full exclusivity requirement, under which venture members may not produce either steel or plastic conduit in competition with the venture. As long as members are free to compete outside the venture, individual firms seeking profits have an incentive to enlarge their *non*-venture

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[3] *See* 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 405 (1995); Herbert Hovenkamp, *Federal Antitrust Policy* §§ 4.1-4.2 (1994).

output in order to compensate for any reduction in output within the venture.[4] In addition, where operating both inside and outside a joint venture is efficient, preventing members from operating in that manner reduces efficiency and artificially limits output expansion. An exclusivity rule thus prevents efficient competition.[5]

Visa's exclusionary bylaw harms consumers in all these ways. The bylaw prevents Dean Witter and all other firms (except for Citicorp) from following an efficient strategy of issuing both a Visa card and a proprietary card. The bylaw thus reduces the competition that takes place both inside the Visa venture (because Dean Witter is precluded from offering its low-priced Visa card) and outside the Visa venture (because other firms are discouraged by the threat of exclusion or expulsion from Visa from offering new proprietary cards).[6]

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[4] Suppose a ten-firm cartel attempts to reduce output from the competitive 100 units to 70 units, but that under the cartel's rules each member is entitled to make unlimited non-cartel sales. One or more members can profit by increasing non-cartel sales until the 30 units are added back into the market, and the cartel will fail. Alternatively, suppose the cartel agrees to withhold a particular innovation from the market; if the innovation is profitable, one or more members will offer it with respect to its non-cartel sales and once again the agreement will fail. In order to succeed, the cartel must prevent its members from making non-cartel sales or innovations.

[5] *Cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 359-61 (1982) (Powell, J., dissenting); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 5, 11 (1979). *See also* Department of Justice & Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, Statement 8 (1994) (indicating much closer scrutiny of "exclusive" joint ventures that prohibit their members from competing outside the venture).

[6] This Court has recognized in other contexts the harm to consumers that can result from collective actions by a large number

(continued...)

Consumers are therefore denied the benefit (here in the form of lower prices) that would result from Dean Witter's inclusion as a Visa member. Moreover, the exclusion raises the costs of Dean Witter and all other firms that contemplate a "multi-card" strategy by denying them the efficiencies of venture membership and thereby further perpetuates high prices in this important industry. The fact that Visa's bylaw operates as an exclusivity rule compounds these ills by preventing any other Visa member from making up for the loss in output caused by Dean Witter's exclusion.

The Court should grant the petition to protect consumers from the Tenth Circuit's misguided market power analysis that ignores these important competitive harms as a matter of law.

II. The Tenth Circuit's "Efficiency Justification" Standard Actually Ignores Efficiency and Uncritically Accepts an Inapposite Business Justification for Naked, Anticompetitive Conduct.

The Tenth Circuit's decision assessed Visa's asserted justification for Bylaw 2.06 based on a legal standard that uncritically accepted Visa's pursuit of maximum profits for its members without regard to whether its conduct is efficient. As a result, the court validated a restraint of trade that actually sacrifices Visa's own efficiency as a network joint venture in order to insulate its individual members from increased price competition from firms seeking to operate more efficiently. Left unreviewed by this Court, the Tenth Circuit's analysis

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[6] (...continued)
of competitors that fall short of collusive price-fixing. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (striking down output limitation agreement among collegiate athletic association with 850 members); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (striking down agreement among 12,000 consulting engineers to refrain from competitive bidding).

promises higher prices for consumers both from Visa's restraint and from future restraints judged under similarly nonchalant rules.

A. Consumers Require Antitrust Rules that Distinguish Legitimate from Feigned Free Rider Claims.

In validating Visa's restraint as a matter of law, the Tenth Circuit accepted Visa's assertion that its restraint was necessary to prevent free riding. Properly defined, free riding is competitively harmful because it reduces the incentives to engage in innovation.[7] If innovators incur all the costs of innovation while copiers take all the rewards, then no one will innovate.[8]

Consumers are thus properly concerned that free riding be controlled, and joint venture exclusion rules can sometimes

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[7] On why free riding leads to reduced output, see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222-23 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 369-70 (7th Cir. 1987); Herbert Hovenkamp, *Federal Antitrust Policy* §§ 5.2b, 11.3a; E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 4.14(A)(3) (2d ed. 1994).

[8] For example, suppose Chrysler and Ford join to develop a new emission control system. General Motors is asked to participate but declines. Later the device proves successful and GM requests a license to use it. An antitrust rule forcing Chrysler and Ford to accommodate GM would permit free riding: any firm that knew it could forgo the high-risk developmental phase of a venture and sign on during the successful production phase would wait until later. The joint venture might never be established at all, and consumers would never receive the benefit of its intended innovations. *See Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985); Herbert Hovenkamp, *Federal Antitrust Policy* § 5.2b.

accomplish this result. But because this Court has never had an opportunity to discuss the appropriate scope of free rider defenses to horizontal restraints, the Tenth Circuit misunderstood and misapplied the concept. While the court properly recognized that free riding was an "efficiency justification," it completely neglected to inquire whether Visa's restraint actually *served* to prevent free riding. As the jury found in returning its verdict for Dean Witter, it plainly does not.

The thrust of Visa's free riding argument -- accepted by the Tenth Circuit -- is that the bylaw is needed for "the protection of property rights[, which] is essential to encourage innovation and risk-taking in business." *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 819 F. Supp. 956, 984, 987 (D. Utah 1993), *rev'd*, 36 F.3d 958 (10th Cir. 1994). While in many contexts the protection of property rights may indeed justify a refusal to deal, the argument has no application here. The hallmark of true free riding is reduced output. To establish a free rider defense to Bylaw 2.06, therefore, Visa should have been required to explain how the admission of Dean Witter would reduce the output of Visa cards or would reduce the incentive to form credit card networks in the first place.

It manifestly does neither. Dean Witter's aggressive marketing of its Visa card would result in increased rather than decreased Visa output. Moreover, Visa is not the type of venture, like a research joint venture, that must be able to enforce closed membership rules to be economically viable. To the contrary, Visa is a classic example of a network joint venture whose efficiency is enhanced by the addition of new members, as the Visa card becomes ever more widely accepted by consumers and merchants. This is why, except for the restraint at issue here, Visa has always followed an open membership policy. By ignoring the fact that Visa's purported justification had nothing to do with the challenged restraint, the Tenth Circuit allowed Visa to "protect" its "property rights" at

the expense of consumers.[9]

The consumer interest in antitrust is best served by a rule requiring that free rider defenses be capable of articulation and defined with care. Not all relationships between producers constitute free riding.[10] Further, within the ordinary range

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[9] The other elements of Visa's free rider defense credited by the Tenth Circuit are similarly inapplicable. Visa claimed that (1) complete separation of systems would encourage more intersystem competition; (2) further growth by Visa might encourage more government regulation; (3) after Visa members were permitted to offer MasterCard cards, the two competed with each other less aggressively; (4) a big player like Dean Witter in Visa would make life harder for smaller members; and (5) Dean Witter might become a Visa Board member and then might have access to confidential information. *SCFC ILC*, 36 F.3d at 969-70.

Items 1-4 have nothing whatsoever to do with free riding. Both (1) and (3) are claims that the bylaw created more competition with other systems. If these claims were true, then one is hard pressed to explain why Visa wanted the bylaw to begin with: rational economic actors do not adopt policies that force them to compete more strenuously. In any event, they are not claims of free riding. Item (2) is not, by itself, an antitrust argument at all. Finally, item (4) is simply a claim that the market would have been *more* competitive rather than less after Dean Witter's entry into Visa.

Only item (5), the expressed concern with confidential information, sounds like free riding. But there was no elaboration of the type of information that Discover might use to Visa's disadvantage and no reason given why this claim had to be accepted as a matter of law simply because it was asserted. Further, no consideration was given to whether less restrictive alternative rules could have been formulated that would accomplish the same result without the accompanying injury to competition. Finally, the presence of Citicorp -- issuer of the competing Diners Club and Carte Blanche proprietary cards -- on the Visa Board fatally undermines the bona fides of this claim.

[10] For example, free riding must be distinguished from simple

(continued...)

where reasonable minds can differ, the fact finder must be able to determine the relevance and truthfulness of free rider claims. Otherwise, free rider defenses will acquire a kind of protected status that shields restraints from antitrust scrutiny whenever free riding is merely asserted.[11]

This case demonstrates that an effort by one firm to take advantage of another firm's or venture's attempted output reduction cannot be the type of free riding that antitrust countenances as a defense. The firm that enters a market subject to collusion or restraints on innovation is certainly "free riding" in the sense that the restraint creates an opportunity for profit. But this is the very mechanism by which antitrust

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[10] (...continued)
product complementarity. Bakers sell more bread because dairies have developed and sell butter, but this does not mean that bakeries are "free riding" on dairies. Rather, the value of each product is enhanced because the other exists. The same thing is true of automobiles and gasoline, stereo sets and compact discs, computer hardware and computer software, and numerous other pairs of complementary products. In *Kodak*, the mere fact that the plaintiffs installed parts that the defendant had made was not "free riding." It was simple product complementarily. *Eastman Kodak Co. v. Image Technical Servs.*, 112 S. Ct. 2072, 2092 (1992).

[11] In conflict with the Tenth Circuit, several other circuits have recognized the importance of factual scrutiny of free-rider claims. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1010-12 (3d Cir. 1994) (free rider defense to agreement among full service wallpaper dealers in association may have been pretextual; fact issue created), *cert. denied*, 115 S. Ct. 1691 (1995); *Big Apple BMW, Inc. v. BMW of North Am., Inc.*, 974 F.2d 1358, 1377 (3d Cir. 1992) (if evidence suggests that free rider claim is pretextual, jury must decide), *cert. denied*, 113 S. Ct. 1262 (1993); *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 721 (7th Cir. 1987) (jury entitled to determine applicability of offered free rider defense); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 410-12 (6th Cir. 1982) (fact finder entitled to reject free rider claim where horizontal restraint was imposed selectively).

encourages the breakdown of anticompetitive horizontal arrangements. In short, such actions should be encouraged, not ruled out as a matter of law.[12]

B. Consumers Require Antitrust Rules that Examine Less Restrictive Alternatives with Care.

Even if a rule imposed by a joint venture which collectively wields market power appears to promote the efficiency of the venture by protecting the venture from free riding, the inquiry should not end. Instead, courts should examine whether a less threatening alternative was reasonably available that would have accomplished substantially the same result. The examination of less restrictive alternatives operates as an Occam's Razor that permits the court to pare off intractable issues and can eliminate or reduce the balky process of "balancing" the benefits and harms to consumers posed by a restraint.

Unfortunately, courts and commentators are deeply split about both the necessity and the nature of the "less restrictive alternative" inquiry.[13] In this case, the Tenth Circuit did not

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[12] *See Premier Elec. Constr.*, 814 F.2d at 370 (noting that competing with a cartel is a form of "free riding," but antitrust must countenance it because this is the way the cartel unravels).

[13] *Compare, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994) (requiring "less restrictive alternative" analysis), *cert. denied*, 115 S. Ct. 1252 (1995) *and Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1396 (9th Cir.) (same), *cert. denied*, 469 U.S. 990 (1984) *and Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984) (same) *and North Am. Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir.) (same), *cert. denied*, 459 U.S. 1074 (1982), *with, e.g., American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (rejecting "less restrictive alternative" test; restraint permissible if it is "reasonably necessary.") *and National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231,

(continued...)

even consider whether any less restrictive alternative was available to address Visa's claimed free rider concerns. Had it, the court would have determined that Visa already had in place mechanisms that addressed the free riding concerns it expressed. Visa's existing fee structure could readily be used to reflect the differing levels of investment made by new and old members. Likewise, Visa's concern with confidential information could be remedied by the simple expedient of keeping Dean Witter off the Visa Board, a practice already followed by Visa for members of the MasterCard Board. The court would not have had to look far to find mechanisms less injurious to consumers to protect Visa's asserted interests.

We ask that the Court resolve the confusion and conflict among the lower courts (1) by defining the proper scope of defenses to agreements among competitors restraining competition; (2) by determining whether free rider claims must be carefully defined and factually supported by the record, with the fact finder entitled to decide reasonably disputable facts; and (3) by determining whether this query requires a determination that no reasonably workable less restrictive alternative would accomplish the same goal.

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[13] (...continued)
1256-57 (S.D. Fla. 1984) (rejecting "least restrictive" test for a "fairly necessary" test), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). *See also* Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 4.2 (1995) ("The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary."); 7 Phillip E. Areeda, *Antitrust Law* ¶ 1505b (1986) (same).

CONCLUSION

For the foregoing reasons, the 27 consumer organizations submitting this brief as *amici curiae* respectfully urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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May 19, 1995

(5)

No. 94-1719

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

MountainWest Financial Corporation,

Petitioner,

v.

VISA U.S.A. Inc.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Financial Services Association (AFSA) respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is necessitated because counsel for respondent Visa U.S.A. Inc. has refused consent, despite the fact that AFSA participated in this case as *amicus curiae* in the Court of Appeals for the Tenth Circuit.

AFSA is the nation's largest trade association representing nonbank providers of financial services, including credit card

services. Its members include more than 450 companies that provide a total of approximately $190 billion of consumer credit in the United States. Their typical customer is younger and less wealthy than the typical customer who is able to borrow money from a bank. The members of AFSA range from small, independently owned consumer finance offices to the consumer financial services affiliates of some of the nation's largest financial, retail, and automotive corporations. Many of AFSA's members are members of Visa and issue VISA cards.

AFSA has a history of commitment to free entry and open competition in the marketplace for consumer credit and financial services. AFSA was founded in 1916 as the American Association of Small Loan Brokers, with the avowed purpose of ensuring a ready market for small cash loans to individuals, households, and small businesses. Over the ensuing decades, the members of the association that has come to be known as AFSA have directly served the credit needs of consumers and small businesses by providing both secured and unsecured loans. They have done so by emphasizing personal service and by adopting innovative approaches that have filled the vacuum when other segments of the financial services industry failed to address the individualized credit needs of average citizens and small businesses. In pursuing this mission, AFSA often has had to confront the efforts of banks to secure unwarranted legal protection against nonbanks in areas that the banks consider to be their traditional markets.

Consistent with its pro-competition and pro-consumer mission, AFSA has a direct and immediate interest in the antitrust issues raised in this case, and participated as *amicus* in the court below. The proper resolution of these issues is obviously of central importance to the credit card industry, and will have substantial consequences for the larger consumer finance industry, in which credit card financing plays a growing part. In addition, the ultimate resolution of the antitrust issues at stake in this case undoubtedly will have a profound influence on the future shape of the entire financial services industry. AFSA believes that this case

provides an important opportunity to lay down a clear and sound statement of the applicable principles of antitrust law that will guide business practices in these important industries over the years ahead. Because of the distinct perspective that AFSA brings to these issues, and because of AFSA's strong interest in these issues, we respectfully move for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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May 19, 1995

QUESTIONS PRESENTED

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be: (a) reasonably related to the venture's business interests, irrespective of efficiencies; (b) reasonably necessary to enhance the venture's efficiencies; or (c) the least restrictive alternative to enhance the venture's efficiencies?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture: (a) an important factor but not a threshold requirement; (b) a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors; or (c) an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market?

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BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

REASONS FOR GRANTING THE WRIT

As they enter the information age, American businesses need antitrust rules that are clear and that also ensure that entrenched interests cannot erect barriers to innovative and efficient competition. The decision below in this case deepens the confusion confronting businesses in a crucial area of antitrust law, and announces a legal rule that ignores a wide range of anticompetitive conduct that could block the efficient production and lower prices that consumers value.

The pernicious effects of the Tenth Circuit's decision, if left unreviewed, are substantial. Departing from previous circuit court cases, the court adopted an extremely lenient test to validate exclusionary conduct by a network joint venture. Firms throughout the fast-growing financial services industry are increasingly turning to network ventures to produce efficiently such new products as "debit cards" and at-home banking. Because such ventures face a variety of conflicting antitrust standards across the country, the financial services industry has long viewed this high-profile case as a landmark. The Tenth Circuit's wrong-headed analysis thus has the potential to shape a generation of business practices throughout the financial services industry.

Visa's exclusionary bylaw has prevented firms in the financial services industry, including AFSA members such as Dean Witter and others, from pursuing a competitively effective strategy of issuing both a VISA card and a proprietary card. The bylaw creates no efficiency but merely allows Visa's large members to protect their current market shares and maintain higher prices than would otherwise prevail. In validating the restraint as a matter of law, the Tenth Circuit applied a threshold market power standard that ignored a broad category of anticompetitive conduct. Specifically, the court's analysis failed to recognize that exclusionary conduct aimed at restraining the effectiveness of competition by an existing competitor can harm consumers just as much as can direct restraints on price.

This incomplete understanding of market power reflects the pervasive confusion among the lower courts regarding the proper definition and role of market power. This confusion has led to openly conflicting results and has stymied businesses' efforts to adapt to new economic challenges through innovative business alliances. In this environment, the Tenth Circuit's misguided analysis has vast potential to do mischief.

AFSA therefore respectfully urges that the Court grant petitioner's Petition for a Writ of Certiorari.

I. THE DECISION BELOW RAISES ANTITRUST ISSUES OF SUBSTANTIAL IMPORTANCE FOR THE ENTIRE FINANCIAL SERVICES MARKET.

AFSA believes this case has established that Visa's discriminatory policy of excluding issuers of competitive non-VISA credit cards and expelling any members of the Visa network that introduce competitive non-VISA cards serves no purpose other than the suppression of competition. AFSA therefore agrees with the unanimous jury verdict, sustained by the District Court, that Visa's discriminatory policy of selective exclusion -- as embodied in Bylaw 2.06 and Bylaw 2.10(e) adopted by the Visa board of directors -- causes substantial harm to competition and consumers and is not justified by any substantial beneficial effects on competition. *See* Pet. App. 37a-38a; *see also id.* at 27a-106a. Since Visa is a network joint venture, whose efficiencies are based on open access, Visa's anticompetitive restraint is unjustified. Allowing other financial institutions to compete as Citicorp does, by creating competitive non-VISA cards while also competing within the Visa network, can only increase the efficiency, diversity, and availability of credit card services, thereby promoting consumer welfare by offering more choices, greater competition, and lower prices.

Visa was well aware at the time it enacted Bylaw 2.06 that its restraint of trade would have a sweeping impact in the credit card market. At the Board meeting where the Bylaw was passed,

Visa compiled a list of firms throughout the United States that are potential issuers of competing proprietary cards and thus are possible future targets of Visa's Bylaw. The list includes over 100 major nonbank companies, some of whom already were issuing VISA cards. Fifteen of the listed companies are AFSA members. Visa's Board apparently is prepared to exclude or expel any or all of these companies if they choose to offer a competing proprietary card. While more of the listed companies have begun issuing credit cards since the Bylaw was enacted, in every case they predictably have responded to its exclusionary threat by opting for a VISA and/or MasterCard card; none of the listed companies has introduced a new proprietary card.

The anticompetitive impact of Visa's artificial restraint is growing and ultimately will affect the entire financial services industry. In the case of Dean Witter, for example, not only does Visa's Bylaw preclude it from following Citicorp's desirable business strategy of offering multiple proprietary cards and association cards, but the Bylaw also is likely to inhibit severely the growth of Dean Witter's recently announced NOVUS network. According to published reports, following its victory at trial in this case, Dean Witter made a substantial investment to transform its nationwide merchant network (built initially for Discover Card) into the newly named "NOVUS network," which can support not only the Discover Card but also other proprietary cards, including cards issued by both Dean Witter and other card issuers. But for Visa's Bylaw 2.06 (and its companion, Bylaw 2.10(e)), the NOVUS network would be a viable and attractive option for firms (including existing Visa members) that are interested in introducing new competing proprietary cards. In light of the Tenth Circuit's reversal, however, the attractiveness of the network to other firms is severely limited since the penalty for issuing a proprietary card is exclusion or expulsion from the Visa network. AFSA also understands that American Express has expressed interest in making its merchant network available for proprietary cards issued by other firms (including existing Visa members), but is similarly stymied by Visa's exclusionary Bylaw.

The contrast in competitive terms between a marketplace with or without Visa's Bylaw is clear. As long as the anticompetitive Bylaw is allowed to remain on the books, all firms (other than Citicorp) will be forced to choose between issuing either bank association cards or proprietary cards. No firm (again, other than Citicorp) will be able to offer both types of cards, even though the evidence presented at trial in this case showed compellingly that for many firms such a multicard strategy is the most efficient means of competing in this market. Except for the two firms that began issuing proprietary cards before Bylaw 2.06 was passed (Dean Witter and American Express), no firm is likely to choose the proprietary card route in the future. (One can only wonder whether, in the long term, Dean Witter and American Express will re-evaluate their own card-issuing strategies.) Dean Witter's ability to transform the NOVUS network into a viable competitor against the powerful Visa and MasterCard networks by attracting other card issuers will be severely hampered. The same will be true with respect to American Express. The predictable result will be fewer cards and reduced network competition, and thus higher prices and less choice for consumers.

Equally troublesome is the potential impact of the decision below on other facets of the financial services industry. The past few years have seen the introduction of new products and services, such as debit cards and ATM machines, which are offered to consumers using the same kinds of network services that are used to provide credit cards. More new network-oriented financial products and services, such as electronic home banking and electronic commerce on the Internet, are on the way. The message of the Tenth Circuit's widely noted decision in this case is that powerful networks are permitted to engage in exclusionary practices that will protect their dominant positions while artificially limiting consumer choice and maintaining higher prices. That is a dangerous message that undermines the basic purposes of the antitrust laws. Already, antitrust challenges to exclusionary practices involving ATM machines have been brought by the Justice Department, with results that stand in marked contrast to the decision below and that would not have

been upheld under the Tenth Circuit's analysis. *See, e.g., United States v. Electronic Payment Services, Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,796 (D. Del. Oct. 14, 1994) (consent decree in government enforcement action provides that defendant ATM network cannot prevent member banks from being affiliated with other ATM networks). It is thus of the utmost importance for the lower courts to have clear guidance now on the proper approach under the antitrust laws for assessing the legality of exclusionary practices such as those at issue here.

In short, AFSA believes that the ultimate precedent left to stand in this case will be a landmark that shapes business practices throughout the financial services industry. The tremendous importance of this case for the national economy makes it a worthy candidate for plenary review.

II. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY THE CENTRAL ISSUE OF MARKET POWER IN EXCLUSION CASES BY RECOGNIZING THE IMPORTANCE OF EXCLUSIONARY MARKET POWER.

The central problem with the market power approach taken by the court below and by many other lower courts is that it fails to account for the nature and importance of exclusionary market power. As a result, in cases that involve antitrust challenges to exclusionary conduct, these courts are generally unable to make a proper evaluation of conduct that in fact creates or exercises this type of market power.

"Exclusionary market power" can be defined as the ability of a firm (or group of firms) to raise price above the competitive level or prevent it from falling to a lower level by acting in ways that raise the costs of rival firms and thereby cause those competitors to restrain their output. In such circumstances, the actions of the first firm have effectively excluded competition by its rival firms by rendering that competition less effective, with resulting harm to consumers. *See, e.g.*, JOE S. BAIN, INDUSTRIAL

ORGANIZATION 324-30 (1959); ROBERT H. BORK, THE ANTITRUST PARADOX 156 (1978). There are a variety of situations in which exclusionary market power can be exercised against competitors in this manner. *See, e.g.*, T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 223-49 (1986) (describing situations in which firms are able, by adopting exclusionary practices, to exercise exclusionary market power at the expense of consumers and competitors) [hereafter *Anticompetitive Exclusion*]; S. Salop & D. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

Exclusionary market power contrasts with the "classical" market power that is exercised when a firm or group of firms is able to control price profitably in a particular market by directly restraining their own output. Classical market power is exercised in circumstances where firms can increase profits simply by reducing the volume of their own output, where the revenue forgone from the reduction in sales volume is more than compensated by the revenue that is gained by the concomitant increase in price. *See generally* GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY (1968); W. Landes & R. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

In this case, the District Court properly recognized that Visa exercised exclusionary market power when it excluded Dean Witter from the Visa venture. Specifically, the District Court concluded that Visa prevented Dean Witter (and other rival firms such as AFSA's members) from expanding output, where that expansion would have enabled Dean Witter and other firms to compete more effectively and strengthen price competition by offering both an association card (the VISA card) and a proprietary card (such as the Discover Card) to consumers. *See* Pet. App. 72a-76a.

In reversing, the Tenth Circuit failed to understand the nature and anticompetitive potential of exclusionary market power. As a result, the court adopted an unjustifiably narrow view

of what constitutes "market power," holding that unless a joint venture's exclusionary conduct deprives the plaintiff of access to "essential facilities," and thus results in the complete ouster of the plaintiff from the relevant market, then the challenged practices cannot constitute an exercise of collective market power. Pet. App. 25a. Moreover, the court treated the existence of market power (narrowly defined in this way) as a threshold test in determining whether a viable Section 1 claim exists. *See id.* at 13a.[1] The overall effect of the court's market power approach was thus to cut off any meaningful scrutiny of Visa's exclusionary practices and effectively to validate Visa's Bylaw 2.06 as a matter of law.

This central flaw led the court below -- and has similarly led other courts -- into four distinct legal errors. The frequent repetition of these errors continues to condemn many legitimate antitrust suits to failure, as a matter of law, based on similarly narrow conceptions of what constitutes the kind of market power that is cognizable in exclusion cases.

First, the court below treated market power as a threshold inquiry that is to be addressed, in isolation, before considering the probable anticompetitive effects of the challenged conduct. This approach might be proper for certain cases that involve only classical market power, but it plainly is not adequate in cases that involve exclusionary market power. The exercise of exclusionary market power can take a great many forms, and its existence cannot generally be revealed except by a careful evaluation of the conduct by which it is exercised. *See Anticompetitive Exclusion, supra*, at 223-49. In these cases, furthermore, it "is the exclusionary conduct that creates the market power being evaluated, not the other way around." T. Krattenmaker, R. Lande & S. Salop, *Monopoly Power and Market Power in Antitrust Law*,

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[1] In this regard, the court below simply accepted the invitation posed by Visa, which asked the court to hold that market power "is a threshold requirement under the rule of reason" and "[i]n the absence of such power, there is . . . no reason to inquire further." App't 10th Cir. Br. 42.

76 GEO. L.J. 241, 255 (1987) [hereafter *Market Power*]. Consequently, treating market power as a threshold issue which must be evaluated *before* considering evidence relating to impact of the exclusionary conduct effectively grants antitrust immunity to a wide range of anticompetitive actions. As described in Section IV of this brief, however, the lower courts are divided on this issue and the Supreme Court has not clearly addressed it.

Second, in requiring evidence that prices were increased above some initial or previous level, the court below did not take proper account of exclusionary market power -- failing to appreciate that, in cases of exclusionary market power, the competitive harm is often the *prevention of prices from falling to new, lower levels*. Thus, the court below concluded that there was no evidence of actual anticompetitive effect because no price increase occurred after Visa adopted its exclusionary bylaw. Pet. App. 19a. However, preventing price declines is precisely the kind of anticompetitive effect that is often intended and achieved by such exclusionary conduct, and the harm to consumers may be just as significant in markets where higher prices are maintained as in other markets where prices are increased by similar conduct. Indeed, this is particularly likely to be the case where, as in the credit card market, vastly improved technology has created sharp decreases in input costs, but exclusionary conduct "can delay or prevent prices from falling altogether by preventing the entry or raising the costs of more efficient [or more aggressive] potential competitors." *Market Power*, *supra*, at 258. Had the court below fully appreciated the nature and importance of exclusionary market power, it could not have dispensed so cavalierly with the trial record and jury finding of substantial anticompetitive effect.[2]

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[2] The approach taken by the court below and by many other lower courts, which fails to recognize the importance of the potential for the exercise of market power to prevent price decreases, reflects an apparent ambiguity in the definition of "market power" that this Court formulated in *NCAA*, phrased as "the ability to raise prices above those that would be charged in a competitive market." *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n.38 (1984). If the emphasis in this passage is

Third, to the extent that the court below considered the issue of exclusion at all, it failed to appreciate that *restraining the expansion of a rival* can harm consumers even if the rival remains a viable but less effective competitor in the market. As noted in Section IV of this brief, in some of its recent decisions the Seventh Circuit has taken this same position, which has otherwise been rejected by other lower courts. Yet this extremely narrow view of what constitutes cognizable market power in exclusionary conduct cases is wholly incorrect when the concept of exclusionary market power is factored into the analysis. Whether or not the challenged practice succeeds in entirely excluding the plaintiff from the relevant market, or even is intended to do so, is less to the point than whether the practice imposes a substantial competitive disadvantage upon the plaintiff and other competitors by raising their costs. *See, e.g., Market Power, supra*, at 248-52. In line with this more comprehensive economic analysis, the Court's decisions have allowed rivals to challenge exclusionary practices even though the plaintiffs remain profitable sellers in the market. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market."); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Fourth, the court below improperly focused on the "atomistic" structure of the joint venture's membership rather than considering the members' collective market share and other factors that bear upon their collective market power. Again, consideration of the concept of exclusionary market power reveals the court's error in this regard. When a joint venture excludes

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placed upon the phrase "raise prices," then the formulation used by the court below would appear to be correct. If the emphasis instead is placed upon the potential gap between actual price and the price that would obtain in a competitive market -- as it should be -- then the formulation recognizes harm to consumer welfare that can flow from conduct that prevents price decreases. This case provides an excellent opportunity for the Court to clear up this apparent ambiguity.

rivals in order to prevent prices from falling, "atomistic" membership structure is irrelevant to the likelihood of anticompetitive harm because the ability of members to raise prices through tacit price collusion is not at issue. By contrast, the venture's large collective market share, and other evidence of its collective ability to disadvantage competitors by excluding them, are highly relevant to the evaluation of exclusionary market power. Such evidence indicates that membership in the venture provides significant competitive benefits, so that exclusion of those that would reduce price will prevent prices from falling.

Thus, if market structure is to be used as a threshold test of a venture's ability to affect price or output through collective exclusionary action, such a test must focus on collective rather than individual market power. One such structural test is a "merger" test, which focuses on whether a merger would be permitted among all the actual members of a venture and all those excluded from the venture. If the competition that would remain after such a merger is so effective that the hypothetical merger would be permitted, then it can be presumed that the venture has neither exclusionary nor classical market power. *See, e.g.*, D. Carlton & S. Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*, U. Chi. Working Paper No. 111, at 53-57 (1995).

Alternatively, courts could use a "collective market share" test. Such a test would recognize the fact that a joint venture can control its members' costs and conduct even if the membership is "atomistic" in structure, and would be easier to administer than a merger test. Such a test would, however, permit some exercises of market power that a merger test would not. *Cf. Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218-21 (D.C. Cir. 1986) (discussing the possible approaches), *cert. denied*, 479 U.S. 1033 (1987). This collective market share approach has been suggested by the federal antitrust enforcement agencies in recent guidelines directed to the health care and intellectual property arenas. *See* U.S. Dep't of Justice & FTC, *Statements of Enforcement Policy and Analytical Principles Relating to Health*

Care and Antitrust, 67 Antitrust & Trade Reg. Rep. at S-12 (Sept. 29, 1994 Supp.); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-17 (Apr. 13, 1995 Supp.). The continuing importance of collective market share has also been recognized by courts that have taken seriously the concept of exclusionary market power, such as courts that have confronted similar exclusionary practices in the area of multiple listing services for real estate. *See, e.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 295 (1992); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370-71 (5th Cir. 1980).

In sum, the most common flaw in the divergent approaches that courts take on the issue of market power in cases involving challenges to exclusionary conduct is that they fail to take proper account of the important concept of exclusionary market power. The body of judicial decisions that results from such incomplete analysis will continue to have widespread consequences for antitrust law if the lower courts remain without definitive guidance about how to approach the market power issue in such cases. The Court should take review in this case to clarify the proper analysis of the concept of market power, which is integral in every antitrust case that involves challenges to the validity of various forms of exclusionary conduct.

III. THE TENTH CIRCUIT'S MISGUIDED MARKET POWER STANDARD INFECTED ITS ANALYSIS OF VISA'S PURPORTED JUSTIFICATIONS.

The Tenth Circuit's failure to appreciate the significance of exclusionary market power also runs through its discussion of Visa's asserted justifications, and contributed to the court's failure to scrutinize those assertions more closely. Instead of requiring proof that a joint venture's exclusionary conduct contributes to its efficiency, the court improperly accepted the premise that pursuing profits by disadvantaging rivals is merely vigorous competition that ought to be protected, not questioned, by the

antitrust laws. *See* Pet. App. 21a.

The court below treated Visa's exercise of exclusionary market power as *per se* reasonable on the ground that no business desires to help its rivals. *See* Pet. App. 21a. In doing so, the court failed to recognize the key distinction between pursuing profits by competing efficiently and pursuing profits by limiting the effectiveness of a rival's competition. *See Anticompetitive Exclusion*, *supra*, at 215-30; *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 369-70 (7th Cir. 1987). The former is legitimately protected by the antitrust laws, but the latter is not. *See, e.g., Aspen Skiing*, 472 U.S. at 605 (where a firm "has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory") (quoting R. BORK, THE ANTITRUST PARADOX, *supra*, at 138). *See generally id.* at 136-60 (discussing proper treatment under antitrust law of conduct that inflicts injury upon rivals). Because it did not make this key distinction, the Tenth Circuit ignored the fact that, as a network joint venture whose efficiency grows by adding new members, Visa was sacrificing its own efficiency in its effort to disadvantage its rivals.

In support of the proposition that disadvantaging rivals is reasonable *per se*, the Tenth Circuit returned to the belief pervading its market power analysis that disadvantaging rivals cannot harm consumers unless the rival firms are completely excluded from the market as a result. Thus, the court accepted Visa's purported justification as a matter of law, stating: "Surely, if [Dean Witter's] goal is to compete more effectively in [the credit card] market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." Pet. App. 25a. To the contrary, as set forth above, such "more effective" competition is a cornerstone of antitrust policy.

Without guidance from this Court, the lower courts will persist in confusion and conflict over the proper legal standard to apply under the rule of reason in evaluating the asserted justifications for exclusionary conduct in joint venture cases. The

decision below presents an excellent opportunity for the Court to provide much-needed guidance on this point as well.

IV. THE DECISION BELOW MERITS REVIEW BECAUSE IT REFLECTS AND PERPETUATES CONFLICTS AMONG THE LOWER COURTS REGARDING THE ROLE AND DEFINITION OF MARKET POWER.

Market power "is a crucial and central issue in almost any complex antitrust case today," and there has been a "widespread and increasing emphasis on the role of market power in antitrust rules." *Market Power*, *supra*, at 243. Nonetheless, as indicated by the forgoing discussion, the courts continue to define and apply the term "market power" in ways "that are both vague and inconsistent," and thus would benefit greatly if the Court were to offer much-needed clarification. *Id.* at 241.

The decision below reflects and perpetuates a conflict among the lower courts on two key issues of market power analysis. First, the courts continue to disagree about the proper role that market power plays in the antitrust analysis of exclusionary conduct under the rule of reason. Second, the courts are split over the proper definition of market power in cases involving exclusionary practices.

The use of market power as a threshold test implicates an important disagreement among the lower courts. Some lower courts, like the Tenth Circuit here, treat market power as a threshold test or "screen" to dispose of cases that do not require meaningful factual scrutiny under the rule of reason. *See, e.g.*, *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1986) ("Market power is a necessary ingredient in every case under the Rule of Reason. Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers"); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (en banc) (absent "market power, any restraint on trade created by the defendants' actions [in

excluding a physician are] unlikely to implicate" the antitrust laws); *National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1258-59 (S.D. Fla. 1984) (market power must be shown to establish a violation under rule of reason analysis), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). The standard practice in such cases is to apply a threshold "market power" test by focusing in isolation on the collective share of the market held by the defendants. *See also* F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (advocating use of such a market power "filter" in rule of reason cases).

Other courts, however, have declined to treat market power as a threshold issue in rule of reason cases. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (in some rule of reason cases, competitive harm is presumed, and the defendant must "promulgate some justification for the restraint even in the absence of detailed market analysis"); *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993) (market power is only a "highly relevant factor in rule of reason cases," and not "the *sine qua non* of antitrust liability"). Still other courts have explicitly divided on this issue. *Compare R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 150-52 (9th Cir. 1989) (en banc) (market power is dispositive in rule of reason cases unless actual anticompetitive effect is shown), *with id.* at 164 (Norris, J., dissenting) ("the Supreme Court has clearly indicated that the 'naked' nature of a restraint is a completely separate reason for avoiding proof of market power"); *and compare Rothery*, 792 F.2d at 217 & n.3 (defendant's collective market share can serve as a dispositive threshold inquiry) *with id.* at 230-32 (Wald, J., concurring) (registering doubt about whether the concept of market power should serve as "the exclusive filtering-out device for all potential violators who do not command a significant market share").

The other component of the Tenth Circuit's market power approach, which is to define market power as the ability of a firm engaging in exclusionary conduct completely to eliminate a competitor from the relevant market, also reflects substantial

disagreement among the lower courts. This restrictive view accords with a similar approach taken by the Seventh Circuit in several recent decisions. *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994); *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1495-97 (7th Cir. 1983), *aff'd as modified*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985). It cannot be squared, however, with the decisions of other circuits discussed above.

This case thus presents an ideal opportunity for the Court to clarify both the role and the definition of market power in cases that involve exclusionary practices. As to the role of market power, numerous lower courts have lamented the fact that the Court has not squarely resolved the issue of whether market power should serve as a threshold test. *See, e.g., Capital Imaging*, 996 F.2d at 546 ("The Supreme Court has never explicitly endorsed such a preclusive threshold approach."); *Rothery*, 792 F.2d at 231-32 (Wald, J., concurring) (Supreme Court has not addressed whether "market screen" approach is proper). *See also* T. Jorde & D. Teece, *Rule of Reason Analysis of Horizontal Arrangements*, 61 ANTITRUST L.J. 579, 603 (1993) (Supreme Court "has not yet stated whether" market power should be applied to provide a "safe harbor" for firms whose conduct is challenged under the rule of reason).[3]

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[3] The Court's prior, albeit indirect and inconclusive, consideration of this issue suggests that it views with skepticism the idea that market power should be addressed in isolation at the threshold, without reference to the precise nature and effects of the challenged conduct. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-62 (1986); *NCAA*, 468 U.S. at 108-110; *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692-96 (1978). Indeed, the Court's decisions to date have sanctioned use of the concept of market power to perform such a threshold role only when determining whether a challenged practice should be subjected to *per se* condemnation as opposed to rule of reason analysis. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-97 (1986).

As to the definition of market power, although the Court from time to time has suggested the relevance of the power to "exclude competition," *see, e.g., Aspen Skiing*, 472 U.S. at 596 n.20; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), the Court to date has provided little explanation or guidance to the lower courts on the subject of exclusionary market power. This case presents a proper vehicle for providing such clarifying guidance to the lower courts.

CONCLUSION

For the foregoing reasons, as well as those presented by petitioner, the Petition for a Writ of Certiorari should be granted in this case to review the decision below of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May 19, 1995

No. 94-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION
Petitioner,

-v.-

VISA U.S.A. INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CENTER FOR PUBLIC INTEREST RESEARCH, THE ORGANIZATION FOR CONSUMER JUSTICE, AND THE EMPIRE STATE CONSUMER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOUNTAINWEST FINANCIAL CORPORATION
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-v.-

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached Brief of *Amici Curiae* in Support of the Petition for Writ of Certiorari. Petitioner MountainWest Financial Corporation has consented to the filing of the brief. This motion is necessary because Respondent VISA U.S.A. Inc. has denied consent.

The *amici*, non-profit organizations whose goals include advocacy on behalf of American consumers, share a concern regarding competition in the market for general purpose charge cards, a modern financial tool carried by millions of Americans. *Amici* have a substantial interest in the level and scope of competition in this market--a market that (1) has witnessed no new proprietary card issuers since the imposition of Visa's Bylaw 2.06, the focus of this lawsuit, and (2) would experience an increase in competition to the benefit of consumers were the jury's finding that Bylaw 2.06 violates the antitrust laws reinstated and Visa membership extended to Petitioner.

The Center for Public Interest Research ("CPIR") is a non-profit statewide consumer research and advocacy organization in Lansing, Michigan. Since 1979, CPIR has worked on behalf of consumers in the areas of insurance, banking, utilities, and the environment. CPIR is a member of the Consumer Federation of America, a non-profit organization that represents the interests of over 50 million American consumers.

The Organization for Consumer Justice ("OCJ") was established in 1975 as a non-profit consumer education organization. OCJ has over 300 members and is a member of the Consumer Federation of America. OCJ is headquartered in Hagerstown, Maryland.

The Empire State Consumer Association ("ESCA"), with offices in Rochester, New York, is a non-profit consumer advocacy organization. ESCA was established in 1974. It is also a member of the Consumer Federation of America.

This case is of great interest to *amici* because the decision of the United States Court of Appeals for the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) poses a serious threat to consumers. *Amici* wish to focus this Court's attention in particular on a fundamental flaw underlying the Tenth Circuit's economic and antitrust analysis: the erroneous notion that, with 6,000 competitors already in the Visa joint venture and competing with each other on price, one more can't "make a difference." In fact, substantial competitive injury to consumers can--and in this case will--result from collective action denying a competitor access to a network joint venture.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s interests coincide with the goal and purpose of antitrust law, which is to promote consumer welfare through low prices and increased innovation, *amici* respectfully seek leave of this Court to file the attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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No. 94-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION

Petitioner,

-v.-

VISA U.S.A. INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE CENTER FOR PUBLIC INTEREST RESEARCH, THE ORGANIZATION FOR CONSUMER JUSTICE, AND THE EMPIRE STATE CONSUMER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

As detailed in the motion accompanying this brief, this case is of great interest to *amici*, as consumer advocacy organizations, because the decision of the United States Court of Appeals for the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) poses a serious threat to consumers. *Amici* wish to focus this Court's attention in particular on a fundamental flaw underlying the Tenth Circuit's economic and antitrust analysis: the erroneous notion that, with 6,000 competitors already in the Visa joint venture and competing with each other on price, one more can't "make a difference." In fact, substantial competitive injury to consumers can--and in this case

will--result from collective action denying a competitor access to a network joint venture.

FACTUAL BACKGROUND

Visa USA Inc. is a network joint venture of banks and other financial institutions that issue Visa credit cards to consumers. Collectively, the members of Visa (almost all of whom also offer MasterCard) account for more than 70 percent of the general purpose credit card market.

The competitive strategy of Visa's largest member, Citicorp, has long been to issue *both* association credit cards (Visa and MasterCard) *and* proprietary credit cards (Diners Club and Carte Blanche). In the early 1980s, Sears[1] decided to follow the same competitive strategy. It began by introducing Discover Card in 1985. As a new and aggressive market participant, Discover Card brought several important features to the marketplace: cardholder pre-approval, no annual fee, cash-back bonuses at year end and deep merchant discounts--all on a nationwide basis.

Following the successful introduction of Discover Card, Sears sought to implement the second part of its two-pronged, Citicorp-like strategy by applying for membership in the Visa joint venture. In response, Visa's board adopted Bylaw 2.06, which provides that, "if permitted by applicable law, [Visa] shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors. . . ."[2]

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[1]At the time, Sears was the parent of what is now Dean Witter, Discover & Co. ("Dean Witter"). Petitioner, MountainWest Financial Corporation, is a wholly owned subsidiary of Dean Witter.

[2]Subsequently, Visa's board also adopted Bylaw 2.10(e), which formally established that an *existing* member of the joint venture

At trial, Visa sought to explain and justify its Bylaw 2.06 with a series of rationales--prevent free riding, increase intersystem competition, etc.--that the jury found transparent and, to put it politely, insincere. More straightforward and revealing--and convincing to the jury--was the concession by Citicorp's representative on the Visa board that, in fact, he voted in favor of the adoption of the exclusionary bylaw because "Discover card was a very effective price competitor," and he "did not want to encourage that kind of price competition within Visa."

SUMMARY OF ARGUMENT

In a decision that "surprised most people in the [credit] card industry,"[3] the Tenth Circuit gave short shrift to the jury's and district court's painstaking examination of the evidence with respect to Visa Bylaw 2.06 and its competitive effects, and instead determined that Visa's bylaw is, as a matter of law, a reasonable restraint. This Court should grant the writ of certiorari in order to resolve the present conflict and confusion among the circuits on the critically important issues of widespread importance raised by this case. In doing so, the Court should reaffirm that concerted action by competitors against a rival--particularly a maverick that, absent the concerted action, would bring increased competition to the marketplace--can constitute a violation of Section 1 of the Sherman Act.

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would likewise not be allowed to issue proprietary cards "deemed competitive" with Visa association cards. In spite of Bylaws 2.06 and 2.10(e), Visa's board has never taken action to prohibit Citicorp--not only its largest member, but the only one at the time of trial with a permanent seat on Visa's board of directors--from continuing to issue its rival Diners Club and Carte Blanche cards.

[3]Knecht, *Dean Witter Loses Court Bid to Enter Its Discover Card in the Visa Network*, Wall St. Journal, Sept. 26, 1994 at A5.

ARGUMENT

One of Visa's linchpin arguments is that, because there are 6,000 competing card issuers in the Visa network, competition cannot be harmed by exclusion of one competitor. As Visa put it in its brief to the Tenth Circuit, "with 6,000 VISA and MasterCard issuers, almost entirely open entry, and no restrictions on output or price competition, what difference does it make?" Brief for Appellant at 55. *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) (No. 93-4105) ("*SCFC I*").[4] Similarly, the district court summarized Visa's argument as follows: that, because "[c]ompetition among the 6000 [Visa] members is said to be vigorous, . . . the exclusion of one additional competitor cannot harm competition." *SCFC ILC, Inc. v. VISA USA, Inc.*, 819 F. Supp. 956, 971 (D. Utah 1993) ("*SCFC II*"). While the district court rejected this argument, the Tenth Circuit's opinion tacitly--and erroneously--endorses it. *Compare SCFC II*, 819 F.Supp. at 971-72 *with SCFC I*, 36 F.3d at 960, 967. However, as this Court, other courts and leading commentators have recognized, even where there are many competitors in a joint venture and each remains free to set its own prices, competition and consumers are harmed when venture members join together to impair the effectiveness of a competitor--especially an aggressive, maverick competitor that, absent the concerted action, would bring lower prices, more innovation and greater choice to consumers.

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[4] *See also* Brief for Appellant at 35 ("there are thousands of VISA issuers"); 43 ("VISA has 6,000 issuers"); 47 ("with 6,000 issuers . . . who compete with each other on price and other terms, and with no output restrictions, how does Bylaw 2.06 give VISA any power to restrict output or raise prices?"); and 50 ("VISA's 6,000 card-issuing members are free to, and do, compete with one another").

A. The exclusion of one rival from a network joint venture *can* and--and in this case *will*--harm competition.

This Court has long recognized the danger of collective action by competitors against a rival, even where the excluding competitors compete vigorously against each other and the excluded party remains a viable competitor. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), for instance, the Court was presented with an association of *90,000 members* whose actions were aimed at the competitive efforts of a single firm. Rejecting the fallacy that one additional competitor could add little to such an "atomistic" market,[5] this Court affirmed the jury's Section 1 verdict for the plaintiff. The Court emphasized that the actions of existing members to manipulate association standards to protect themselves from a particularly potent competitor who wished to introduce a new product "dramatically illustrate" the power of the members--when acting collectively--to restrain competition even in the absence of price fixing. *Id.* at 571.

A similar result obtained in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1974), where a labor union attempted to insulate 75 or more union contractors from competition with nonunion contractors. Even though there remained unfettered competition among the union contractors, the Court was concerned about exclusion of nonunion contractors who might be more efficient and noted that "competition based on efficiency is a positive value that the antitrust laws strive to protect." *Id.* at 623. As the Court explained: "Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the

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[5] *Compare with SCFC II*, 36 F.3d at 967 (the credit card issuer market "remains atomistic").

business market has substantial anticompetitive effects, both actual and potential . . . ." *Id.* at 625.[6]

The sound reasons for condemning exclusion of a single competitor, even where there are already a large number of firms and they are competing vigorously, has been explained by Professor Areeda:

> Imagine that 100 producers of something compete perfectly with each other, with both output and prices at the competitive level. Suppose that they somehow gang up to prevent a 101st firm from entering their market. If output and even price are the only concerns of antitrust law, should it ignore this boycott . . . ?
>
> . . .
>
> The hypothetical boycott should be condemned by antitrust law for three overlapping reasons. First, the 100 firms would be acting irrationally to devote any resources to excluding the 101st firm from the market, unless they believed it helped their profits to do so. That is, they must be assuming that there would be a price output effect . . . Given that certain proof of anything is both

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[6]*See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (affirming jury verdict that joint activity of competitors to exclude a rival from product certification violated Section 1 even absent of price-fixing); *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (striking down provision preventing league members from investing in teams of a rival sports league); *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) (affirming jury's Section 1 verdict against exclusion of hospital from the Blue Cross network when hospital was acquired by a rival network).

> difficult and socially costly, it is both convenient and sensible to assume that business people are acting in their own self-interest and to assume that an unambiguously exclusionary purpose tends to indicate an anticompetitive effect. Second, as a general proposition, entry opportunities free of private restraint are critical to the achievement of economic efficiency. Third, when a challenged restraint is of a type that generally impairs competition and no offsetting redeeming values are offered, it is prudent for antitrust law to condemn it without burdening the legal system with having to prove a detrimental power or effect. The strong fairness claims of allowing access to markets is entirely congruent with economic efficiency and not opposed to it.

Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L. J. 523, 536-37 (1983).

As Professor Areeda's analysis confirms, even if a large number of competitors are competing "perfectly" with each other, their concerted exclusion of another competitor can run afoul of Section 1. Plainly, "collusive behavior is not limited to prices, market division, and boycotts. Competitors may employ horizontal agreements to raise their rivals' costs by disadvantaging firms outside the agreement or preventing innovative practices by nonparticipating firms." Langenfeld, *Anticompetitive Agreements Among Competitors*, 709 PLI/Corp. 89, PLI Order No. B4-6944 (Oct. 1990). *See also* Carlton & Salop, *You Keep Knocking But You Can't Come In: Evaluating Restrictions on Access to Joint Ventures*, Working Paper No. 111, Center for the Study of the Economy and the State, the University of Chicago (April 1995) (detailing how joint venture access rules of the type instituted by Visa can reduce competition by raising the excluded firm's costs).

B. Competive injury to consumers is magnified when--as here--the excluded rival is an industry maverick that would otherwise introduce particularly vigorous competition.

The competitive injury caused by competitors acting in concert to exclude an industry maverick from a network joint venture can be particularly pronounced. A maverick firm is an innovative and aggressive challenger who typically brings consumers more choices and lower prices.[7] The idea that "a single competitor in a market with many actual or potential competitors is unlikely to generate much competitive pressure," is "not always accurate, as it ignores the importance of a firm's individual business strategy in determining its competitive significance." Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1070-71 (1991). As Professor Gerla explains:

> Firms following unusual business strategies tend to be market disrupters, destroying "gentlemanly competition" and generating competitive pressure vastly out of proportion to their size. The disruptive business strategy can assume a variety of forms. For example, the disruptive firm could generate a great deal of competitive pressure by acting as a price cutter, by introducing innovative products and processes, or by utilizing different methods of distribution. Thus, in order to gauge the competitive significance of a particular firm, the finder of fact must examine both market structure *and the*

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[7] *See* Fox, *The Future of the Per Se Rule: Two Visions at War with One Another*, 29 WASHBURN L. J. 200, 210 (1990) (referring to such firms as "robust agents of competition").

> *particular competitive strategy employed by that firm.* (emphasis added) (footnotes omitted) *Id.* at 1071-72.[8]

This view is shared by both federal antitrust enforcement agencies, whose *Horizontal Merger Guidelines* recognize the important impact a maverick firm can have on competition. The *Guidelines*, which are applicable to proposed joint ventures, indicate that the federal enforcement agencies may challenge otherwise allowable horizontal joint ventures or mergers--even when the firms have low market shares and the industry is not concentrated--where the effect of the joint venture or merger is to stifle a "maverick" competitor who is an "unusually disruptive and competitive influence in the market." U.S. Department of Justice & Federal Trade Commission, § 2.12 *Horizontal Merger Guidelines* (1992).[9]

The record in this case demonstrates that Dean Witter is the industry maverick, and that its approach to marketing Visa cards would

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[8]The jury that heard this case--and later, the district court--made precisely such an examination of "market structure and the particular competitive strateg[ies]" present in the general purpose credit card market in which Dean Witter and the Visa network operate. *See generally SCFC I*, 819 F.Supp. at 961-66.

[9]Previous versions of the agencies' merger guidelines contain similar statements. *See* U.S. Department of Justice, § III(C)(2)(c) *Merger Guidelines* (1982); Federal Trade Commission, § 3(A)2 *Statement Concerning Horizontal Mergers* (June 14, 1982); U.S. Department of Justice, § I(8) *Merger Guidelines* (1968). *See also United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (acquisition of innovative firm that "disrupted" market may cause serious injury to competition). While enforcement policies have changed substantially in the last 30 years, one thing has remained constant--a recognition that the unrestrained presence of a maverick can bring substantial procompetitive benefits to the market.

benefit consumers. Thus, Dean Witter's proposed Prime Option Visa was designed, among other things, to incorporate lower interest rates, be offered at no annual fee, contain a periodic skip-a-payment feature and offer a relatively high initial credit line. Equally important, its proposed *nationwide* offering of Visa Prime Option would bring the benefits of increased output to all American consumers, not just those in small local or regional areas where the vast majority of Visa members market and offer Visa cards. Consumers will suffer if Visa is allowed to exclude Dean Witter's "disruptive and competitive influence" from the otherwise "gentlemanly competition" of the Visa network. Such an exclusion would also kill any prospect that consumers might benefit from the competition that would be provided by the entry of additional proprietary cards into a market that has witnessed the entry of not a single proprietary credit card issuer since Visa's adoption of Bylaw 2.06.

In sum, even in the absence of price fixing or explicit output restrictions, the exclusion of Dean Witter from the Visa network joint venture through use of Bylaw 2.06 allows Visa members--who possess substantial market power when acting collectively--to harm competition. Consumers should be able to enjoy the added competition in the general purpose credit card market that would be realized if the jury's finding that Visa's exclusionary bylaw is anticompetitive is allowed to stand, as it should be under well-settled legal and economic principles.

CONCLUSION

For the foregoing reasons, *amici curiae* request this Court to grant the petition for a writ of certiorari.

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IN THE

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OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,

Petitioner,

—v.—

VISA U.S.A. INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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VISA'S OPPOSITION CONFIRMS THAT THE TWO LEGAL ISSUES SQUARELY RAISED BY THIS CASE ARE OF BROAD IMPORTANCE AND ARE THE SUBJECT OF CLEAR CONFLICT IN THE LOWER COURTS.

Visa's brief in opposition serves only to confirm that this "landmark" case, which raises "significant legal issues," is worthy of plenary review.[1] Visa devotes the vast majority of its brief to rearguing the facts found against it by the jury and to arguing the legal merits of the decision below. The fact arguments are irrelevant, both now and at the merits stage, since the Tenth Circuit's reversal of the jury's verdict was entirely on legal grounds. Visa's merits arguments, on the other hand, simply underscore the broad importance of this case—and of the legal issues raised—both for the financial services industry and for the proper application of the antitrust laws to businesses throughout the country. In the end, there can be no doubt that the two central legal issues raised in this case are "important question[s] of federal law which [have] not been, but should be, settled by this Court." S. Ct. R. 10.1(c).

To be sure, Visa does offer a half-hearted denial that these two issues are the subject of conflicting decisions in the lower courts. Yet Visa's actual discussion glides past any serious analysis of the cases themselves (*see* Opp. 13-14, 26-27; *compare*

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[1] These descriptions of the case are not, as Visa suggests (Opp. 2), self-serving formulations "assert[ed]" by *Petitioner*, but rather are accurate quotations from a leading trade journal and a leading national newspaper. *See* Pet. 2. The importance of the issues at stake is underscored as well by the participation of businesses, *see* Briefs Amicus Curiae of the American Financial Services Ass'n and of American Express Travel Related Services Co., Inc., and consumer groups, *see* Briefs Amici Curiae of 27 National, State and Local Consumer Organizations and of the Center for Public Interest Research, *et al.*, as *amici curiae* in support of the petition. Underscoring the "landmark" status of this case further still is the large number of leading antitrust scholars who have closely followed the litigation and, in many instances, have published articles regarding the case and the issues it raises. These include individuals who have been retained by Dean Witter (*e.g.*, Carlton, Hovenkamp, Kauper, Kearl, Salop) and individuals who have been retained by Visa or its member banks (*e.g.*, Areeda, Baker, Baxter, Schmalensee). Numerous other antitrust commentators also have published articles recently on the subject matter of this case (*e.g.*, Balto, Blumenthal, Kattan, Perritt, Piraino).

Pet. 14-18, 23-26), and the existence of these important conflicts, as well as the pressing need for Supreme Court clarification, is repeatedly confirmed by Visa's own authorities, including nearly every one of the antitrust commentators upon whom Visa relies. Perhaps the most telling example is Balto, an FTC lawyer, who in a forthcoming article that Visa's opposition repeatedly cites (Opp. 5 n.3, 20 n.23) makes a veritable plea to the Court to grant *certiorari* in this case in order to clarify the present confusing state of the law. *See* Balto, *Access Demands to Payment Systems Joint Ventures*, 18 Harv. J.L. & Pub. Pol'y 636 (forthcoming June 1995) (repeatedly expressing the view that there is "a lack of clarity in the legal standards" governing joint venture membership rules (*id.* at 637, 681), that the current standards are "vague" (*id.* at 637) and "particularly cloudy" (*id.* at 651) and that this "lack of clarity" precipitates increased litigation over joint venture issues (*id.* at 681)). Balto's article concludes: "Joint ventures are an ever more essential facet of the economy; providing a clear, predictable standard for the risks [that joint ventures] face from access demands will enhance their ability to compete." *Id.* at 682.

Similarly, Baker, in an article funded by several Visa member banks, argues that analysis of joint venture restraints in the wake of "*Broadcast Music*, *Northwest Wholesale*, and *NCAA* . . . is little more than a jurisprudential bog," and concludes that "[h]opefully, with time, the Supreme Court will correct the anomalies and uncertainties infecting the question of compulsory access to network joint ventures." Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999, 1051-52, 1133 (Opp. 18 n.22). *See also* Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 962 (1993) (Opp. 19, 20) (noting that confusion about prior Supreme Court joint venture decisions "may still inhibit some efficiency-enhancing joint venture restrictions"); Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 807 (1992) (Opp. 23, 26 n.28) (noting "important questions remain" unresolved regarding market power under rule of reason, including "is [market power] an essential ingredient in antitrust cases, or merely one of several factors to be taken into account?" and "how one determines whether market power exists in a particular situation"); Blumenthal, *Three Vexing Issues Under the Essential Facilities*

Doctrine: ATM Networks as Illustration, 58 Antitrust L.J. 855, 856, 864-68 (1990) (Opp. 20) (noting "anomalies that may spell trouble as a matter of public policy" in leading cases relating to access to network joint ventures).

The lack of settled law on the questions presented is powerfully illustrated by Visa's brief in yet another way: with respect to the ancillary restraint issue Visa fails to cite a single opinion of the Court issued since 1912, and with respect to market power Visa cites only a decade-old case that poses but does not resolve the issue presented.

Recognizing that it cannot negate the existence of two decisive circuit splits, Visa falls back to the suggestion that these issues are not material to the holding of the Tenth Circuit and thus to the ultimate result in this case. As stated in the petition, however, and as shown more succinctly here, the Tenth Circuit's legal holdings on these two important issues of antitrust law were not only material to but determined the outcome of its errant decision. The Court therefore should grant the petition for a Writ of Certiorari on both issues.

A. The Standard for a Lawful Ancillary Restraint.

As explained in the petition (Pet. 13-14), in its quartet of joint venture cases decided between 1979 and 1986 the Court never encountered a suitable opportunity to provide meaningful guidance regarding the degree to which, under the rule of reason, a joint venture's restraint must relate to the venture's efficiencies. That issue, which is of substantial consequence to business planning across all sectors of the economy, especially in view of the growing popularity of joint ventures and other partial integrations, is the first question that Visa contends is not of sufficient importance to be settled authoritatively by this Court.

Visa starts with the unsupported claim that there is no "conflict in the circuits on the issue of ancillary restraints" (Opp. 13), but soon admits that the legal standard is "expressed in different words by different courts within as well as among the various circuits" (*id.* 14). Moreover, as the petition explains, what Visa attempts to pass off as "nuances of expression" (*id.*) are in fact decidedly different substantive legal standards. *See* Pet. 14-18. Visa's characterization is further belied by the numerous

courts and commentators that have noted the existence of a substantive conflict. *See supra*; Pet. 14, 16.

That the differing standards reflect fundamental *and dispositive* conflicts about the kinds of conduct that may be legal under the antitrust laws is perhaps best illustrated by this case. Had the Tenth Circuit actually examined whether Visa's exclusionary bylaw promotes the specific efficiencies of the network joint venture—in accordance with the standard typified by the D.C. Circuit (Pet. 14-15, 17)—it plainly would have reached the opposite outcome. *See* Pet. 19-21. Had the court gone a step further and required Visa to show that no less restrictive alternative could have achieved these same efficiencies—the test required by the First Circuit and others (Pet. 18)—it again would have been obliged to affirm the District Court.

Visa's other attempts to evade this irreconcilable split are still less persuasive. Visa's reliance on the fact that not all of the conflicting lower court cases were cited to the Tenth Circuit (Opp. 14) is baffling: Dean Witter was not obliged and would have been ill-advised to file *certiorari* papers as its merits brief in the Tenth Circuit. Visa does not suggest (nor could it) that Dean Witter failed to raise its legal argument concerning ancillarity below. *See* Brief of Appellee (10th Cir.) 22-36.

Visa also suggests that the legal standard for determining ancillarity is not really at issue in this case (Opp. 15), but the Tenth Circuit in fact focused directly on the issue, asking "is Bylaw 2.06 ancillary[?]"[2] App. 21a. In any event, as Visa later

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[2] Numerous other courts have likewise focused on the principle of ancillarity in joint venture membership cases. *See, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1252 (1995); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581-82 (11th Cir. 1991), *cert. denied*, 113 S.Ct. 295 (1992); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980). Moreover, contrary to Visa's characterization (Opp. 15 n.18), *Terminal Railroad* did in fact focus on the ancillarity of the challenged restraint in terms of whether it increased the efficiency of the defendant venture. *See United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 405-08 (1912). *See also* Baker, *Compulsory Access, supra*, at 1022 (describing *Terminal Railroad* as "an opinion heavily—and most interestingly—leavened with efficiency analysis"). The other two cases that Visa cites do not contain

admits, the "relevant issue" is the same "whether phrased in terms of ancillary restraint principles or not." Opp. 15. However the issue is phrased, the standard employed by the Tenth Circuit deepens the split on the central legal question of the circumstances in which joint venture restraints of trade are justified.

By devoting the bulk of its discussion of ancillary restraints to the merits of the issue, Visa only reinforces the importance of plenary review by the Court. *See* Opp. 15-22. In particular, Visa argues in great detail for the adoption of a much broader view of "efficiency." Specifically, Visa would have courts consider "*ex ante* 'macro' efficiencies that depend upon general assumptions about the way the economy works." *Id.* 17. Accordingly, Visa argues that, in addition to the efficiencies of the joint venture whose conduct is in question, other "efficiencies" are relevant, such as protecting property rights generally and enhancing incentives for the formation of other joint ventures. *Id.* 17-20. These provocative policy arguments and others, such as that joint ventures should be treated the same as single firms under the antitrust laws (*id.* 17-18), are the basis of the approach adopted by the Tenth Circuit and would be very much at issue on the merits. They are plainly beside the point at the *certiorari* stage. For present purposes, the important point is that of the three ancillarity standards employed by the lower courts, only the one applied by the Tenth Circuit reaches Visa's desired result.[3]

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any suggestion that ancillarity was irrelevant because of the nature of the challenged restraints in those cases. *See Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982).

[3] By contrast, Visa's attempt to reargue its version of the facts relating to efficiency is, and will remain, entirely irrelevant. In light of the jury verdict, the Court would credit Dean Witter's version of the facts on plenary review. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990). In any event, Visa fails to mention several incontrovertible facts in the record that illustrate why the jury rejected Visa's factual case as pretextual. Thus, while Visa asserts that it excluded Dean Witter because Dean Witter is an intersystem competitor (Opp. 4, 7) whose admission would permit free riding (*id.* 16-17), undermine innovation incentives (*id.* 17-19) and make Visa "overinclusive" (*id.* 21), the jury heard evidence that: (i) Visa has chosen to be an "open" joint venture that admits hundreds of new members every year,

In sum, the ancillary restraint question poses core issues about how to apply the Sherman Act in cases involving challenges to joint venture restraints. It is of broad importance, presents a clear conflict in the lower courts and is dispositive in this case. This question thus merits plenary review here and an authoritative resolution by the Court.

B. The Role and Definition of Market Power.

Visa likewise claims that the market power question does not merit review, because there allegedly is "no meaningful conflict" on this issue and because it is a "false premise" that the Tenth Circuit employed "a market power 'screen' that was outcome determinative." Opp. 23.

Once again, however, Visa's subsequent argument undercuts its claim that this issue is not worthy of plenary review. Visa immediately launches into an extended merits argument premised on the controversial proposition that collective market share is not a proper indicator of Visa's market power even though Visa is acting as a collective entity in adopting and enforcing the challenged exclusionary bylaw. Opp. 23-25; *contrast* Pet. 26 n.19 (citing this Court's precedents that suggest the opposite). Leaving aside for now the debate as to whether Visa is right on the merits of this legal issue, it is plain that Visa's discussion actually provides additional support for plenary review of the market power approach in the decision below.

As with the ancillary restraint issue, Visa's claim that Dean Witter has concocted the lower courts' split relating to market power proves to be self-refuting. Visa is forced to acknowledge

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all of whom "free ride" in the strained sense Visa uses the term (Pet. 4); (ii) almost all of Visa's members issue the MasterCard card, and Visa's largest member, Citicorp, also issues both Diners Club and Carte Blanche proprietary cards (all of which Visa has long considered to be "major" competing cards) (*id.* 8, 9 & n.8; R. M653); (iii) Visa has always been willing to welcome Dean Witter as a member, but only on the condition that Dean Witter eliminate Discover as a competing proprietary card (Pet. 6; Opp. 7 n.6); and (iv) Visa passed its exclusionary bylaw with the specific intent of deterring the entry of additional competing cards and thereby inhibiting the entry and growth of competing networks (Pet. 6, 7; *see also* Briefs Amicus Curiae of American Financial Services Ass'n 4-5, and of American Express Travel Related Services Co., Inc.).

that only "*some* courts" treat market power "as a preliminary hurdle (filter or screen)," while recognizing, as the petition discusses at length, that *other* courts refuse to apply market power as a screen. Opp. 26-27 & n.29 (emphasis added). Visa also does not quarrel with the further split identified in the petition between those courts whose screen can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors, and those courts, like the Tenth Circuit below, whose screen disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market. *See* Pet. 24-26.

Instead, Visa offers only the vague and unhelpful suggestion that it is "misguided" to hope for any uniform treatment of this issue in the antitrust case law. Opp. 26. Visa's generalized pessimism, however, is hardly a sufficient reason to ignore the substantial body of circuit court case law and scholarly commentary that has discussed and deplored the disagreement and confusion that pervade the courts' treatment of the proper role and definition of market power in rule of reason cases. *See* Pet. 22-26. That is particularly so given that the current unsatisfactory state of the law can be directly attributed to the fact that the Court has never had a suitable opportunity to clarify the market power issue. *See id.* 22 & n.16.

Visa's minimal discussion of the market power authorities set forth in the petition only serves to reinforce the reality of the conflict and confusion regarding joint venture market power standards. Of all the cases on this issue addressed in the petition, the only one discussed by Visa is the Second Circuit's decision in *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993), which Visa agrees does not apply a dispositive market power screen. Opp. 27 n.29; *accord* Pet. 23. Visa's assertion that the Second Circuit's market power standard is not in conflict with that of the Tenth Circuit is powerfully refuted by the fact that in Dean Witter's substantively identical suit against MasterCard, a district

court in the Second Circuit reached a result directly opposite to that of the court below.[4] Pet. 28-29.

Finally, Visa disputes that the Tenth Circuit's application of a market power "screen" determined the outcome in this case. Opp. 23. This claim rings particularly hollow given that Visa strenuously urged the court below to adopt precisely this approach.[5] In the end Visa was successful, for the Tenth Circuit explicitly endorsed a market "screen" or "filter" approach. App. 13a. In addition, the Tenth Circuit adopted a heightened market power standard, previously suggested by a line of Seventh Circuit cases, that required Dean Witter to prove that it had been effectively excluded from the relevant market. In holding that the controlling "legal issue" was whether the challenged bylaw caused Dean Witter's "exclusion from the market," the Tenth Circuit accepted Visa's argument (repeated before this Court) that challenges to joint venture exclusions should only succeed on proof that the venture is an "essential facility." *See* App. 23a-25a & n.19; Opp. 18 & n.21. Thus, it did not matter that—as the Tenth Circuit freely acknowledged—Dean Witter showed that membership in Visa would allow it to compete "more effectively" (App. 25a) and that its membership was rejected in order to

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[4] The only other petition authorities addressed by Visa are the enforcement guidelines issued by the federal antitrust agencies. Visa asserts that Dean Witter misinterprets the enforcement policy reflected in those guidelines as being at odds with the Tenth Circuit's opinion, but it is actually Visa that mischaracterizes the guidelines. Opp. 20 & n.24; *compare* Pet. 28. Indeed, the antitrust agencies express specific concern about exclusivity requirements that, like Visa's, "increase competitors' costs." U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-10 (April 13, 1995 Supp.); *see also* Brief Amicus Curiae of American Financial Services Ass'n 6-12 (discussing anticompetitive significance of raising rivals' costs). Even if Visa's interpretation of federal enforcement policy were correct, that would be yet another source of confusion in the law and would reinforce the existence and significance of the splits of authority identified in the petition.

[5] *See, e.g.*, Brief of Appellant (10th Cir.) 42 (arguing that market power "is a threshold requirement under the rule of reason. . . . Proper application of that screen should have ended the inquiry in this case.").

"discourage price competition within Visa" (*id.* 21a).[6] According to the Tenth Circuit, any effect other than effective exclusion from the relevant market fell short as a matter of law: "Surely, if [Dean Witter's] goal is to compete *more effectively* in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." App. 25a (emphasis in original).

Because the Tenth Circuit's ruling turned on its legal definition of what constitutes market power, Visa is mistaken when it claims that "Dean Witter's case failed without regard to any particular standard of market power" because of its "failure to prove harm to competition." Opp. 26. In reversing the District Court, the Tenth Circuit did not purport to review the entire record or to apply any standard other than its own. After substituting its own "legal" market power standard ("exclusion from the market," App 18a) for the District Court's, the court below made only the limited review of the record required by that standard (*id.* 18a-19a). Finally, based on *that* review and *its* legal standard, the court concluded there was "insufficient" evidence that Visa "possessed market power." *Id.* 19a. The Tenth Circuit did not suggest that Dean Witter failed to satisfy the District Court's market power standard; and Dean Witter did not (and does not) suggest that it satisfies the Tenth Circuit's standard. Accordingly, on plenary review, the Court would be resolving a purely legal conflict.

The market power issue thus presents an important question of antitrust law about which the lower courts are deeply divided—one that will recur increasingly as joint ventures and partial integrations become ever more common. The correct result in this case hinges directly on which approach is adopted by this Court. This issue deserves plenary review.[7]

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[6] That these effects harm competition and consumers, not just a competitor like Dean Witter, is recognized by the lower courts that employ either of the two market power standards not adopted by the Tenth Circuit. *See supra*; Pet. 23-25, 27; Briefs Amici Curiae of Center for Public Interest Research, *et. al.* 4-10, of 27 National, State and Local Consumer Organizations 4-10, and of the American Financial Services Ass'n 6-12, 14-17.

[7] The additional points stated by Visa at the end of its opposition warrant only a brief response. For purposes of *certiorari*, the first and fourth points have already been addressed. The second point is simply mistaken—

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dean Witter has consistently argued that the fact that Visa is an open joint venture that has applied its new exclusionary policy on a selective and discriminatory basis is germane to the credibility of Visa's purported justifications for its bylaw, not that this fact justifies a special legal rule. *See* Pet. 19-21. The third point is a red herring: the fact that the parties stipulated to the relevant product market did not amount to a stipulation that exclusion from 70 percent of that market cannot harm competition as a matter of law. The fifth point is also mistaken, because Visa excluded Dean Witter, in part, in order to deter other firms from issuing new proprietary cards and because the impact on other firms is relevant to Visa's market power. *See id.* 27. In addition, the briefs *amicus curiae* filed on behalf of other target firms note that the deterrent effect, which harms those firms and consumers, also harms Dean Witter because other issuers are prevented from issuing new proprietary cards on Dean Witter's network. *See* Briefs Amicus Curiae of the American Financial Services Ass'n 4-5, and of American Express Travel Related Services Co., Inc.